Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1033

WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
*Appellants,*

vs.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
*Appellees.*

AN APPEAL FROM THE
SUPREME COURT OF THE STATE OF FLORIDA

## JURISDICTIONAL STATEMENT

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No.

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WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
*Appellants,*

VS.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
*Appellees.*

---

AN APPEAL FROM THE
SUPREME COURT OF THE STATE OF FLORIDA

---

## JURISDICTIONAL STATEMENT

---

### INTRODUCTION

Appellant appeals from the final order and judgment of the Supreme Court of Florida entered October 4, 1979, denying appellant's Motion for Rehearing, and thereby affirming such Supreme Court's decision of May 31, 1979, upholding the constitutionality of Florida Statute §28.33. In holding such statute valid, the Supreme Court of Florida reversed a decision of the trial court which had declared the same to be unconstitutional. This case therefore raises the question of whether or not the retention by government of *all income* earned upon monies deposited at interest in a Court registry (and pursuant to a

Court order) constitutes a taking of property without due process of law and in violation of equal protection precepts. The retention of all interest herein is *in addition* to a statutory fee charged against the principal sum. Thus, this case challenges the validity of Florida Statute §28.33 which mandates that such interest be thus retained. Appellant also asserts the statute improperly impinges upon an exclusively judicial function through legislative fiat.

## OPINIONS BELOW

This case followed a direct line of appeal from the Circuit (trial) Court in and for Seminole County, Florida, to the Supreme Court of Florida. The trial court's original order (Appendix A) provided only that interest earned on funds deposited in the court registry belonged ultimately to the parties determined to be entitled to the principal sum. Subsequently, before the state appellate proceedings were perfected, the trial court amplified this opinion with the addition of language to its opinion (Appendix B), amending the original order nunc pro tunc, as follows:

> Ordered and adjudged that Florida Statute §28.33 and Laws of Florida, Chapter 73-282 [essentially one in the same] are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case.

The Florida Supreme Court subsequently reached a contrary conclusion declaring "There is no unconstitutional taking" in its decision reported at 374 So2d 951 (Appendix C). One Florida Justice, concurring in part and dissenting in part, commented "the assertion that the retention of the

interest by the county is an unconstitutional interference with the judicial process has merit." Nonetheless, rehearing by the Supreme Court of Florida was denied, as also reported at 374 So2d 951 (Appendix C). Notice of Appeal to this Court was filed in Florida's Supreme Court on December 12, 1979. (Appendix D).

## GROUNDS UPON WHICH JURISDICTION IS INVOKED

This case is fundamentally a United States Constitution 5th and 14th Amendment challenge of a lengthy state statute which provides in pertinent part as follows:

> Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates . . . All interest accruing from monies deposited shall be deemed income of the office of the clerk of the circuit court. . . §28.33 Official Florida Statutes, 1977, at page 162. (For unabridged text of this statute please see Appendix E).

Appellant argues the appropriation of interest earned on private monies held in the court registry is a denial of due process, a taking without just compensation violative of equal protection precepts and an act legislatively mandated in violation of the separation of powers doctrine. Appellant also asserts the statute creates an unconstitutional tax upon use of and access to the Courts.

This court has jurisdiction hereof pursuant to 28 U.S.C.A. §1257 (2). It has commented previously in similar cases, holding that fees and emoluments collected by a Clerk of Court and deposited at interest are not public monies. *United States v. MacMillan,* 40 Sup.Ct. 540, 253 U.S. 195, 64 L.ed. 857 (1920). See also *United States v. Mason,* 31 Sup. Ct. 28, 218 U.S. 517, 54 L.ed.

1133 (1910). Since Florida prescribes an additional statutory fee for utilization of the court registry, payable out of the principal sum when it is first deposited into the registry, this argument is especially compelling. (See §28.24, Official Florida Statutes, 1977, at page 160).

It is an abrogation of the rights of a citizen of the United States to place a tax upon use of and access to the Courts, such use and access being an implicit right of citizenship.

While under the law of Florida a small fee for the use of the court registry may validly be imposed, retention of all interest earned on private monies can only be deemed a tax since the exaction is a forced contribution to meet the public needs of government and is not a charge reasonably related to the cost of services rendered in return. *Flood v. State ex rel. Homeland Co.,* 117 So. 385 (Sup.Ct. Fla., 1928). Furthermore, this last stated principle antedates even our United States Constitution. As the Florida Supreme Court itself said in *Flood,* supra, quoting from *Malin v. LaMoure County,* 145 N.W. 582 (Sup.Ct. N.D., 1916):

> We realize that the clause of the Magna Charta . . . which we have paraphrased . . . into 'All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay,' has generally been construed . . . against the selling of justice . . . in other words, that a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to every one. *Flood,* at 387.

It is thus clearly for this court to determine if the tax as here applied to appellants in fact affects constitutional rights. *Storaasli v. State of Minn.*, 51 Sup.Ct. 354, 283 U.S. 57, 75 L.ed. 839 (1931). Further, no matter how the state court may characterize the charges imposed on use of the court registry, the United States Supreme Court is not bound by the guises into which state courts may cast a tax. *St. Louis Cotton Compress Co. v. Arkansas,* 43 Sup.Ct. 125, 260 U.S. 346, 67 L.ed 297 (1922). See also *Allegeyer v. Louisiana,* 17 Sup.Ct. 427, 165 U.S. 578, 41 L.ed 832 (1897). To permit the courts to function as tax collectors would reduce them to a subordinate branch of government. *Ex parte Coffelt,* 228 P.2d 199. (Crim. Ct. App. Okla., 1951).

Citizens of the United States are guaranteed a republican form of government. U.S. Constitution, Art. IV, § 4. Thus, the separation of powers between the legislative branch and the judicial branch of state government which is mandated under the Florida State Constitution at Article II, §3 is similarly protected under Federal Law. The doctrine of separation of powers is an inherent and integral element of the republican form of government. As such, it is expressly guaranteed to the states and their citizens by the national government. [See *VanSickle v. Shanahan,* 511 P.2d 223, (Sup.Ct. Kan., 1973) wherein this Court's decisions under Article IV, §4 of the U.S. Constitution are analyzed at length.] Where legislative authority presumes, in effect, to tax utilization of the court registry and to regulate the terms and conditions upon which the courts may administer their own registry departments, the concept of republican government is jeopardized.

It has been held true repeatedly that the taking of all interest earned upon private funds deposited in a court

registry is a taking without just compensation and thus an inherent denial of due process and equal protection of the laws guaranteed to citizens of the United States under both the 5th and 14th Amendments of the United States Constitution. Citing federal constitutional principles, the highest state courts throughout this land have time after time deferred to what they declare to be compelling due process and equal protection requirements, concluding that interest earned upon a sum deposited in a trial court's registry is property of the owner of the principal and not of any department of government. *Sellers v. Harris County,* 483 S.W.2d 242 (Sup.Ct. Tex., 1972), *Bordy v. Smith et al.,* 34 N.W.2d 331 (Sup.Ct. Neb., 1948), *State v. McFetridge,* 54 N.W. 1 (Sup.Ct. Wisc., 1893). See also *Myles Salt Co. v. Board of Commissioners,* 239 U.S. 478, 36 Sup.Ct. 204, 60 L.ed. 392 (1916) where it is observed that the contention a state law as administered and justified by the highest court of the state violates the Federal Constitution presents a federal question.

That significant federal questions are squarely raised in proceedings such as these is clear to the highest state courts. They have almost unanimously concluded that to permit interest on registry funds to accrue to the account of government is wrong because "*The result is untenable so long as private property is constitutionally protected.*" *Sellers,* supra at 243 (emphasis added). To like effect it has also been said:

> The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision. . . that no person shall be deprived of his property 'by law of the land,' applies to the earnings in the same manner and with the same force as it applies to principal. *McMillan v. Robeson County,* 137 S.E.2d, 105 at 108 (Sup.Ct. N.C., 1964).

The North Carolina view is rightfully the law of the land. *University of South Carolina v. Elliott,* 149 S.E.2d 433 (Sup.Ct. S.C., 1966) *Ostley v. Saper,* 305 P.2d 946 (2d DCA Cal., 1957); *Water District v. Adams,* 197 P.2d 543 (Sup.Ct. Cal., 1948); *Board of Law Library Trustees of Los Angeles v. Lowery,* 154 P.2d 719 (Ct. of App. Calif., 1945); *Kierman v. Cleland,* 273 P. 938 (Sup.Ct. Idaho, 1929); *Pomona City District v. Payne,* 50 P.2d 822 (C.A. Calif., 1935); *Drainage Dist. No. 2 of Ada Cty. v. Ada Cty.,* 226 P. 290 (Sup.Ct. Idaho, 1924); *Lawson v. Baker,* 220 S.W. 260 (Ct. Civ. App. Tex., 1920, error ref'd.)

## QUESTION PRESENTED BY THIS APPEAL

The following question is presented by this appeal:

> Does a state statute providing that all interest monies earned upon funds held in the registry of the court automatically become county monies violate the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article IV, §4 thereof?

In such connection it should be reiterated that the retention of all interest is a charge made in addition to a statutory fee paid from the principal sum. Thus, in Florida where funds are deposited into the court registry, less is ultimately paid out of the registry than is initially placed in it, no matter how large an income said funds may produce.

## STATEMENT OF THE CASE

This is an interpleader action brought pursuant to Chapter 676, Florida Statutes.

In February, 1976, Eckerd's purchased most of the assets of Webb's Pharmacies. At "closing" Webb's debts appeared greater than the purchase price. Therefore, pursuant to the Bulk Sales Act (Chapter 676, Official Florida Statutes, 1977) Eckerd's (as Plaintiff below), paid the purchase money proceeds into the Circuit Court Registry pursuant to an Interpleader Complaint.

Prior to ordering the Interpleader fund paid into its Registry, the Court learned the Clerk claimed entitlement to all interest which might be earned thereon in addition to a statutory fee of one (1%) percent on the first $500.00 and one-half (1/2%) percent of the balance of all funds placed with the clerk. These statutory one percent and one-half percent charges, collected pursuant to Section 28.24, Official Florida Statutes, supra, are not at issue here except insofar as their very existence enhances Appellant's arguments.

The trial court therefore entered a Final Order of Interpleader on June 15, 1976, which was thereafter supplemented under date of July 12, 1976, by an Order which states in pertinent part:

> . . . The Court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk . . . shall accrue to the benefit of the Clerk's office or to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk . . . shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of

> the receipt of said funds or the earnings thereon, have any greater claim thereto than before such receipt. (Appendix F)

The principal sum delivered to the Clerk was One Million Eight Hundred Forty Five Thousand Two Hundred Forty Seven and 77/100 ($1,845,247.77) Dollars. The sum of interest earned thereon and now in issue here exceeds One Hundred Thousand and no/100 ($100,000.00) Dollars.

In part because of the present and then incipient controversy, and also for other substantial reasons not pertinent here, a Receiver was later appointed to hold the principal sum and to invest the same at interest for the creditors hereto. Following his appointment, the Receiver raised the constitutional issues discussed herein repeatedly and directly to the trial court. Following a decision favorable to the Receiver by the trial court, the Clerk successfully appealed to the Florida Supreme Court. The Receiver now brings this appeal.

The Clerk still holds the accrued and compounding interest which is at issue here.

## REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

The reasons why the questions presented by this appeal are substantial are obvious. Plenary consideration, with briefs on the merits and oral argument is clearly necessary. Among the compelling reasons this matter needs consideration on the merits are:

> (a) While this Court has considered issues similar to the ones raised here in the past, it has been nearly 60 years since issues akin to these have been deliberated here.

(b) This Court has never considered the exact issue raised on this appeal.

(c) The retention of interest earned on private monies held in a court registry is a taking of property without due process of law and a denial of the law's equal protection; at issue is an outright expropriation of private property by legislative fiat.

(d) The taking of property mandated by the challenged statute is a legislative invasion into the sole province of the judiciary, violative of the guarantee of a republican form of government.

(e) The challenged statute constitutes an unconstitutional tax and charge upon the administration of justice and access to the Courts; it is impossible for appellants to utilize the judicial process under the facts of this case without paying the State the $100,000 plus tariff demanded.

That these are all substantial constitutional issues under our Federal Constitution is clear from the series of state appellate court decisions previously cited. An ample line of cases holds statutes like the one challenged constitutionally infirm. Such issues are well within the ambit of this tribunal. *United States v. Morgan,* 59 Sup.Ct. 795, 307 U.S. 183, 83 L.ed. 1211 (1939); *United States v. MacMillan,* supra; *United States v. Mason,* supra, *Florida v. Anderson,* 91 U.S. 683, 23 L.ed. 458 (1876). Since a rule of reason is ultimately the basic law of our land, it is for this Supreme Court to determine whether an asserted right guaranteed to all citizens of these United States is denied by the laws of any state. *Angel v. Bullington,* 67 Sup.Ct. 657, 330 U.S. 183, 91 L.ed. 832 (1946); *Pollock v. Williams,* 64 Sup.Ct. 792, 322 U.S. 4, 88 L.ed 1095 (1944).

## CONCLUSION

It is submitted that the Supreme Court of the United States has jurisdiction of this appeal. Further, should this Court determine this appeal to have been taken improvidently, it is respectfully requested that these papers be treated as a Petition for Writ of Certiorari pursuant to 28 U.S.C.A. §2103.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant in the cause above captioned, and a member of the Bar of the United States Supreme Court, hereby certify and state that all parties required to be served with the foregoing Jurisdictional Statement have been served in accordance with the Supreme Court Rules.

HARVEY M. ALPER, ESQUIRE

# APPENDIX A

**IN THE CIRCUIT COURT IN AND FOR THE EIGHTEENTH JUDICIAL CIRCUIT, SEMINOLE COUNTY, FLORIDA**

**CIVIL ACTION NO. 76-354-CA-17-EE**

ECKERD'S OF COLLEGE PARK, INC.,

Plaintiffs,

vs.

WEBB'S FABULOUS PHARMACIES, INC., et al.,

Defendants.

_____/

## ORDER

This cause came on to be heard on the Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1134), together with Receiver's Memorandum in Support of Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1223), Errata Sheet to Receiver's Memorandum in Support of Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, page 1225); Memorandum in Opposition to Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1251), and Receiver's Memorandum in Reply to Memorandum in Opposition to Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1262). Having carefully considered said Motion, Memoranda, and Errata the Court finds and it is accordingly

ORDERED AND ADJUDGED that the Clerk of this Court is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order recorded July 12, 1976 in Official Records Book 1091, Page 0494, of the Public Records of Seminole County, Florida; the creditors herein are the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court. It is further

ORDERED AND ADJUDGED that having determined only those issues listed in Paragraphs c. and 3. of the Limited Order of Recusal entered June 20, 1978, and the Order of Reassignment entered by the Chief Judge June 26, 1978, the undersigned hereby defers to the Honorable Dominick J. Salfi, the Judge regularly assigned to this case, determination of whether to grant the aforementioned Receiver's First Amended Motion for Direction to the Clerk to Remit Certain Monies to Receiver.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 24th day of July, 1978.

/s/ KENNETH M. LEFFLER
CIRCUIT JUDGE

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## APPENDIX B

**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA.**

**CASE NO. 76-354-CA-17-EE**

ECKERD'S OF COLLEGE PARK, INC.,

Plaintiff,

v.

WEBB'S FABULOUS PHARMACIES, INC., ET AL.,

Defendants.

_____/

### ORDER

THIS CAUSE having come on to be heard on August 23, 1978, on the Receiver's Motion for Nunc Pro Tunc Order Correcting Omission from the Record and the Court being fully advised in the premises, finds, as follows:

1. Pursuant to Florida Rule of Civil Procedure 1.540(a) and Florida Appellate Rule 9.130(f), this Court has jurisdiction pending appeal to amplify its Order, dated July 24, 1978, by setting forth the grounds upon which such Order was based. It is particularly incumbent upon this Court to do so in light of the constitutional issues raised herein which may be determinative of the proper appellate forum for the pending appeal.

2. The Order, dated July 24, 1978, and entered by the undersigned Judge, is amended nunc pro tunc by the addition of the following language:

ORDERED and ADJUDGED that Florida Statutes § 28.33 and Laws of Florida, Chapter 73-282 are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case.

DONE and ORDERED in Chambers at the Courthouse in Sanford, Florida, this 23d day of August, A.D., 1978.

/s/ Kenneth M. Leffler
CIRCUIT JUDGE

CERTIFICATE OF JUDGE'S SECRETARY

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to all those individuals on the attached Schedule "A" this 23d day of August, A.D., 1978.

/s/ Sharon Tucker
Secretary to Circuit Judge

Approved as to form:

/s/ Harvey M. Alper
HARVEY M. ALPER,
RECEIVER

/s/ Harry A. Stewart
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## APPENDIX C

Arthur H. BECKWITH, Jr., Clerk of the Circuit Court, etc., Appellants,

v.

WEBB'S FABULOUS PHARMACIES, INC., et al., Appellees.

No. 55213.

Supreme Court of Florida

May 31, 1979

Rehearing Denied Oct. 4, 1979.

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Harry A. Stewart, Sanford, for appellants.

Harvey M. Alper and William H. Wack, of Law Offices of Alper & Wack, Altamonte Springs, for appellees and Harvey M. Alper as receiver, in pro per.

PER CURIAM.

The constitutionality of section 28.33, Florida Statutes (1977), which provides that interest accruing on funds in the registry of the court shall be deemed income of the Office of the Clerk of the Circuit Court, is before the court.[1]

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[1] § 28.33 Fla.Stat. (1977), reads in pertinent part:

> Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned or all investments during the preceding year.

We hold the statute constitutional. Art. V, § 3(b)(1), Fla.Const.

Eckerd's of College Park, Inc. (Eckerd's) entered into an agreement with Webb's Fabulous Pharmacies, Inc. (Webb's) to purchase Webb's assets. Eckerd's, pursuant to statutory authority, filed an interpleader action against Webb's and its creditors, tendering the purchase price of $1,812,145.77. The court appointed a receiver to determine the number and amount of claims filed against these funds and to establish accounts for the deposit of the funds.

On Eckerd's motion, the trial court ordered that the purchase price be deposited in the registry of the court. The court also ordered the clerk to deposit the funds in "an assignable interest bearing account at the highest rate of interest." The court reserved ruling on whether the interest earned on the money would accrue to the court's clerk's office. The clerk followed the court's order. The receiver filed a motion seeking to obtain the interest earned on the money in the sum of $91,474.71. In an order granting the receiver's motion, the trial court held section 28.33, Florida Statutes (1977), unconstitutional to the extent it applied to these "private" monies. The clerk appealed to the Fourth District Court of Appeal and that court transferred the case to this court.

It is the receiver's position (apparently adopted by the trial court), that it is constitutionally inconsistent to have funds held by a receiver and invested by him to result in earnings to the prevailing party, yet funds held by the clerk of the circuit court earning interest to be kept for the general treasury. The statute is also unconstitutional, says the receiver, because it violates section 57.051, Florida

Statutes (1977),[2] and constitutes either a taking without due process of law or an unlawful tax.

[1,2] We begin our analysis by reviewing rules of law so well established as not to require citation. It is not this court's responsibility to determine the wisdom of legislative acts, nor is it the court's function to strike down legislative schemes because we would have fashioned different plans for achieving the desired results. We must begin with the presumption that the act is constitutional, and it is to be upheld unless a specific provision of the state or federal constitution is clearly violated.

Inherent in the trial judge's ruling is a finding that interest earned is the private property of the person ultimately receiving the principal. This proposition rests on the underlying premise that the principal remains private when deposited in the clerk's registry. Neither the premise nor the conclusion withstands close analysis.

[3] Section 28.33 does two things: (1) it authorizes the clerk to invest money in the registry of the court in order to earn interest; and (2) it dictates the disposition of the interest earned. Without this statute, the clerk would have no authority to invest money held in the registry of the court. It is the statute itself which gives the authority to the clerk and outlines the method of disposition.

The notion that title to the interest flows from title to the principal is erroneous. As all other funds in that account, these funds are considered "public money" from the time they are deposited in the general registry of the

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[2] § 57.051, Fla.Stat. (1977), reads in pertinent part:

> (1) PROHIBITION. – No officer shall make two charges for the same official act or service, nor charge for any constructive service. No fee shall be charged for any official service performed or claimed to be performed by any officer unless the fee is specifically authorized and its amount is specified by law.

court to the time they leave the account. *See Money v. State ex rel. Florida First National Bank,* 206 So.2d 436 (Fla. 1st DCA 1968); § 219.01(2), Fla.Stat. (1977).

**[4]** The receiver states that the interest retained by the clerk of court is either a fee or a tax. It is neither. The statute permits the state to retain only the amount representing interest earned on funds invested by the clerk, a function of the clerk expressly created by the statute. Interest accrues only because of section 28.33. In this sense, the statute takes only what it creates. Failure to recognize this fact would result in the erroneous holding that the clerk is required to pay interest on all funds on deposit with the registry of the court.

**[5]** It is irrelevant that had these funds been initially held by a receiver, the interest earned would have accrued to the party receiving the principal. In that event, judicial discretion would have been exercised and the legislature, under our separation of powers doctrine, could not effect a change in the court's order. Art. II, § 3, Fla.Const. The legislature has the right, however, to decide that funds held by a public officer in a public account accrue to the benefit of all of the people.

**[6]** There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property.

**[7]** The rule announced today shall apply in this case and in all cases where deposits of funds are made after the effective date of this opinion.

Accordingly, the order of the trial judge is reversed, the statute is held to be constitutional, and the case is remanded to the trial court for further action consistent with this opinion.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring in part, dissenting in part.

I agree that the subject statute is constitutional but only if it is construed as directory rather than mandatory. In my opinion, the trial judge must have the discretionary authority to direct the disposition of the interest earned on funds placed in the registry of the court pursuant to a court proceeding. To hold otherwise allows the legislative branch to improperly interfere with the resolution of a judicial matter.

In my opinion, in order for the statute to be constitutional, the trial court must continue to retain its inherent discretionary authority to direct disposition of the interest earned on funds placed in the registry as part of a court action. Without such authority, the assertion that the retention of the interest by the county is an unconstitutional interference with the judicial process has merit. The clerk receives a fee separate from the interest for acting as a depository, so the interest cannot be considered as a service charge. Section 28.33, Florida Statutes (1977), concerns the investment of all county funds held by the clerk, not just funds in the court registry. Moneys deposited in the "registry of the court" are funds which are strictly and directly controlled by the court. This control is exclusively a judicial function. Allowing the clerk the discretion to earn interest on those funds without any judicial control results in a surcharge on the use of the justice system, and can neither be justified nor allowed if the courts are to be

"open to every person for redress of any injury." Art. I, § 21, Fla.Const. In the instant case, the mandatory price tag for the use of the justice system, under the majority opinion, is $91,474.71. The impropriety of such a charge is even more egregious when we consider the fact that there are statutes which require the interpleading of funds into the registry of the court. *See, e.g.*, § 676.106, Fla.Stat. (1977) [Uniform Commercial Code].

I would uphold the constitutionality of the statute and construe the part relating to court registry funds as directory, allowing the trial judge to affirmatively direct the disposition of interest earned. If there were no such affirmative judicial action, the interest earned would be disposed of in acccordance with the statutory provision.

# APPENDIX D

## IN THE SUPREME COURT OF THE STATE OF FLORIDA

| | |
|---|---|
| ARTHUR H. BECKWITH, JR., Clerk of the Circuit Court and Seminole County, Florida,<br><br>Appellants,<br><br>v.<br><br>WEBB'S FABULOUS PHARMACIES, INC., and ECKERD'S OF COLLEGE PARK, INC., et al.,<br><br>Appellees. | CASE NO. 55,213<br><br>(Appeal From the Circuit Court, Seminole County, Florida, Transferred from District Court of Appeal, Fourth District, Pursuant to Florida Appellate Rule 9.040(b), etc.; Transferred to Supreme Court September 14, 1978 |

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY given that Webb's Fabulous Pharmacies, Inc., and Eckerd's of College Park, Inc., et al., appellees above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of Florida entered herein on October 4, 1979, denying rehearing on a "per curium" decision of such Court (with opinion) entered May 31, 1979, affirming the retention by appellants of interest earned upon private funds deposited in the registry of the Circuit Court registry of appellants in and for Seminole County,. Florida.

THIS APPEAL IS taken pursuant to 28 USC 1257(2).

Respectfully submitted this 12th day of December, 1979.

BY: /s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
MASSEY, ALPER, WACK & EATON
165 Whooping Loop
Altamonte Springs, Florida 32701
305/834-8111

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof have been furnished by depositing the same in a United States post office or mailbox, with first class postage prepaid and with airmail postage thereon prepaid as may be required by the rules of the Supreme Court of the United States to the Supreme Court of Florida and copies hereof to Harry Stewart, Esquire, as County Attorney, Seminole County Courthouse, North Park Avenue, Sanford, Florida 32771; Robert H. Roth, Esquire, as Class Representative, 1180 Hartford Building, Orlando, Florida 32801; and to all other parties listed on the attached Schedule A, this 12th day of December, 1979.

/s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
MASSEY, ALPER, WACK & EATON
165 Whooping Loop
Altamonte Springs, Florida 32701
305/834-8111

## SCHEDULE A

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## APPENDIX E

**28.33 Investment of county funds.**—The Clerk of the Circuit Court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. All investments shall be open for bid to all qualified depositories in the county. The clerk shall select the highest and best bid for deposit. All bids received by the clerk shall include, but not be limited to, the interest rate to be earned and the total amount of dollar return to be paid to the clerk. In the event of a like bid between two or more banks, the moneys shall be divided and deposited in each bank, so long as the total interest income from the divided deposits will not be less than the total interest income had the deposits not been divided. If at the time of bid the dollar return on direct obligations of the Federal Government is greater than the highest bank return, then the clerk shall invest in the higher return security. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations. In any county where local banks refuse to bid on securing such money on interest-bearing certificates, the clerk may request and receive bids from banks in other counties within the state and make such deposits to the successful bidder. All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the

same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year.

## APPENDIX F

**IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA**

**CASE NO: 76-354-CA-17-EE**

ECKERD'S OF COLLEGE PARK, INC.

Plaintiff,

vs.

WEBB'S FABULOUS PHARMACIES, INC., et al.,

Defendants,

---

### ORDER

This cause came on to be heard upon the motion of the plaintiff, Eckerd's of College Park, Inc., for directions with respect to the investment of the funds held by the plaintiff pursuant to the order entered by this court on June 15, 1976, and it appearing to the court that the present investment of such funds matures on July 13, 1976 and the court being fully advised in the premises, it is therefore

ORDERED AND ADJUDGED THAT:

1. The plaintiff, Eckerd's of College Park, Inc., is hereby authorized and directed to withdraw the aforesaid funds immediately upon maturity of the existing investment and to transfer and deliver the entire fund including all interest and earnings thereon forthwith to the Clerk of the Circuit Court of Seminole County.

2. The Clerk of the Circuit Court is hereby authorized and directed, immediately upon receipt of said funds to

deposit the same in an assignable interest bearing account at the highest interest obtainable by bid for a term not to exceed 90 days, subject to further order of this court.

3. Upon transfer of the funds to and receipt therefor by the Clerk of the Circuit Court, the plaintiff, Eckerd's of College Park, Inc., shall be relieved and discharged from further obligation or liability arising out of the custody and investment of such funds.

4. The court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk of the Circuit Court shall accrue to the benefit of the Clerk's office or to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk of the Circuit Court shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of the receipt of said funds or the earnings thereon, have any greater claim thereto than before such receipt.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 12th day of July, 1976.

/s/ D.J. Salfi
Circuit Judge

Copies to all parties.

Supreme Court, U. S.
FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

# APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-1033**

WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
*Appellants,*

VS.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
*Appellees.*

**AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA**

**JURISDICTIONAL STATEMENT FILED DECEMBER 31, 1979**
**PROBABLE JURISDICTION NOTED MARCH 17, 1980**

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IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SEMINOLE COUNTY — CIVIL ACTION

| | | |
|---|---|---|
| ECKERD'S OF COLLEGE PARK, INC. Plaintiff, | : | NO. 76-354-CA-17-EE |
| vs. | : | JUDGE |
| WEBB'S FABULOUS PHARMACY, INC., et al., Defendants. | : | DOMINICK J. SALFI |

## FINAL ORDER OF INTERPLEADER

Final hearing upon Plaintiff's Complaint for Interpleader having come up for hearing on this date upon due notice, and the Court having considered the evidence presented at this hearing, the pleadings and discovery in the Court file, the arguments and representations made by counsel present at the hearing, and the Court being otherwise advised in the premises, finds:

1. The Plaintiff is holding $1,812,145.77, together with accrued interest thereon, as to which it disclaims any interest except to receive unencumbered title to the assets described in the Purchase Agreement dated February 12, 1976 between the Plaintiff and Defendant, WEBB'S FABULOUS PHARMACIES, INC. ("Webb's"), free and clear of all claims of creditors of the Defendant, Webb's, save and except for those obligations which it agreed to assume pursuant to the terms of the said Purchase Agreement.

2. The Defendants in this case either have or may assert conflicting claims to the moneys described in Paragraph 1

above, and Plaintiff cannot safely determine the validity, amount or priority of all said claims.

3. The Plaintiff has paid fair consideration for the assets described in the aforesaid Purchase Agreement and has compiied with all the requirements of the bulk sales law as set forth in Chapter 676, Florida Statutes 1975.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. Plaintiff shall henceforth hold the $1,812,145.77 described in the Complaint for Interpleader, together with accrued and accruing interest thereon, pending further order of this Court, and the same shall be deemed to be held IN CUSTODIA LEGIS.

2. Plaintiff has acquired unencumbered title to the assets which it purchased from the Defendant, Webb's, pursuant to the aforesaid Purchase Agreement, free and clear of all claims and liens of the creditors of the Defendant, Webb's, and Plaintiff is hereby relieved and discharged from any liabilities and obligations to any of the Defendants herein which arise out of the transactions contemplated by said Purchase Agreement, save and except for those obligations which the Plaintiff agreed to assume pursuant to the terms of the said Purchase Agreement.

3. It is further ORDERED that the Defendants be, and they hereby are directed, to interplead and litigate in this proceeding their several claims to the moneys hereinabove described.

4. All of the Defendants in this cause be and they hereby are restrained and enjoined from instituting or prosecuting in any court, any suit or action of any kind against the Plaintiff on account of or arising out of the transactions

contemplated by the Purchase Agreement, or from instituting or prosecuting in any court any suit or action of any kind against the assets purchased by the Plaintiff pursuant to the Purchase Agreement.

5. This Court reserves decision as to Plaintiff's right to be paid an attorney's fee, or reimbursed for its costs in connection with this proceeding out of the aforesaid moneys, and as to the payment of interest upon said moneys and a hearing is hereby set before this Court, in Chambers, on *June 24, 1976 at 10:00 A.M.,* for the purpose of determining and adjudicating these issues.

DONE AND ORDERED in Chambers in Sanford, Seminole County, Florida, this 15th day of June, A.D. 1976.

/s/ D.J. Salfi
D.J. Salfi
CIRCUIT JUDGE

Copies furnished to:

ALL PARTIES OF RECORD

[Title Omitted In Printing]

ORDER

This cause came on to be heard upon the motion of the plaintiff, Eckerd's of College Park, Inc., for directions with respect to the investment of the funds held by the plaintiff pursuant to the order entered by this court on June 15, 1976, and it appearing to the court that the present investment of such funds matures on July 13, 1976 and the court being fully advised in the premises, it is therefore

ORDERED AND ADJUDGED THAT:

1. The plaintiff, Eckerd's of College Park, Inc., is hereby authorized and directed to withdraw the aforesaid funds immediately upon maturity of the existing investment and to transfer and deliver the entire fund including all interest and earnings thereon forthwith to the Clerk of the Circuit Court of Seminole County.

2. The Clerk of the Circuit Court is hereby authorized and directed, immediately upon receipt of said funds to deposit the same in an assignable interest bearing account at the highest interest obtainable by bid for a term not to exceed 90 days, subject to further order of this court.

3. Upon transfer of the funds to and receipt therefor by the Clerk of the Circuit Court, the plaintiff, Eckerd's of College Park, Inc., shall be relieved and discharged from further obligation or liability arising out of the custody and investment of such funds.

4. The court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk of the Circuit Court shall accrue to the benefit of the Clerk's of-

fice or to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk of the Circuit Court shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of the receipt of said funds or the earnings thereon, have any greater claim thereto than before such receipt.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 12th day of July, 1976.

/s/ D.J. Salfi
D.J. SALFI
Circuit Judge

Copies to all parties

[Title Omitted In Printing]

## NOTICE OF DEPOSIT

COMES NOW, ECKERD'S OF COLLEGE PARK, INC., by and through its undersigned attorneys, and states that on July 13, 1976 the sum of ONE MILLION EIGHT HUNDRED FORTY-FIVE THOUSAND AND TWO HUNDRED FORTY-SEVEN AND 77/100 DOLLARS ($1,845,247.77) was deposited with the Clerk of the Circuit Court in and for Seminole County, Florida pursuant to Order of this Court. Attached hereto and by reference made a part hereof is a copy of the Cashier's Check deposited with the Clerk and a copy of the receipt issued by said Clerk.

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, to the parties of record, on this the 13th day of July, 1976.

SHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A.
Post Office Box 3324, Tampa, Florida 33601
Attorneys for ECKERD'S OF COLLEGE PARK, INC.

By /s/ Benjamin H. Hill
BENJAMIN H. HILL, III

(Referenced Exhibits Omitted In Printing)

[Title Omitted In Printing]

ORDER

This cause came on to be heard before the Court on May 25, 1977, upon the several motions and other matters disposed of herein. Upon consideration of the motions and argument of counsel and the Court being fully advised, it is thereupon:

ORDERED:

1. That until further order of this Court, service of copies of this Order and all future pleadings, motions, orders and other papers in this cause shall be served only upon the parties and/or attorneys listed in Schedule "A" attached hereto, and upon the Receiver appointed herein, provided that any pleading, motion or order directed to, seeking relief against, or otherwise directly affecting any party not listed in Schedule "A", shall in addition be served upon such affected party.

2. The objections of the Defendant, Nancy Kunze as Trustee in Bankruptcy of Webb's Fabulous Pharmacies, Inc., and the Defendant, McKesson and Robbins, Inc., to the claim of American Heritage Life Insurance Company and the Counterclaim and Cross-Claim set forth therein, and all other objections, pleadings and motions directed to the claim of American Heritage Life Insurance Company and/or Webb's Fabulous Pharmacies, its officers or directors, arising out of such claim, are hereby denied, stricken, or dismissed, as the case may be, without prejudice to those objections, motions and claims being refiled as hereinafter set forth.

3. Upon the Court's own motion, the claim of American Heritage Life Insurance Company to the fund of money

held in the Registry of this Court as set forth in the Answer of American Heritage Life Insurance Company filed on April 13, 1976 (Pleading No. 449), is hereby stricken from said Answer and American Heritage may, within 20 days of the date of this Order, file and serve a separate pleading setting forth its claim to the interpleader funds.

4. The Defendant, Nancy Kunze as Trustee in Bankruptcy for Webb's Fabulous Pharmacies, Inc., McKesson and Robbins, Inc., and/or any other party to this action may within 20 days after service of the claim of American Heritage, plead in response to such claim by motion, answer, or affirmative defense, as they may be advised in accordance with the Rules of Civil Procedure. Any party seeking to file any counterclaim, cross-claim or seeking any other affirmative relief against American Heritage or any other party may file and serve such claim by separate pleading filed and served no later than 20 days after service of the American Heritage claim.

5. The Clerk of the Circuit Court is hereby directed to prepare and file an accounting with respect to the interpleader funds deposited in the Registry of this Court on July 13, 1976, and any interest earned thereon, which accounting shall run through May 31, 1977. A copy of such accounting shall be served upon each of the parties listed in Schedule "A" attached hereto and to the Receiver appointed herein.

6. Upon the Court's own motion and in exercise of the Court's inherent power and jurisdiction, the Court hereby appoints *Harvey M. Alper, 165 Whooping Loop, Altamonte Springs, Florida, 32771,* a member of the Florida Bar, as Receiver with the following powers, rights and duties:

A. The Receiver herein appointed shall, with all convenient speed, examine the file in this cause and determine from the file and the pleadings therein the number and amount of claims filed against the fund in interpleader and shall prepare and file with this Court and serve upon the parties shown on Schedule "A", a list of such claims which shall identify the claimant, the amount of the claim, and whether the claim is or purports to be secured or unsecured and the nature of the security for such claim.

B. The Receiver shall as soon as practicable, make such investigation as he deems necessary and, based upon such investigation, propose to the Court the establishment of such account or accounts in such institution or institutions which may qualify for designation pursuant to Florida Statute §69.031, as will obtain the maximum return upon the interpleader fund on behalf of the creditors. Upon the deposit of and the receipt for the funds in such institution or institutions as may be designated by the Court pursuant to the proposal of the Receiver or the determination of the Court, the Receiver's bond shall be waived and no bond shall be required of him to qualify to enter upon his office and the exercise of his powers and duties herein.

C. The Receiver shall have and exercise such authority, powers and duties as are granted herein and as may be from time to time granted by order of this Court upon the Court's own motion or upon application by the Receiver.

DONE and ORDERED in Chambers at Sanford, Seminole County, Florida, this 5th day of July, 1977.

/s/ D.J. Salfi
D.J. SALFI
CIRCUIT JUDGE

Copies furnished to all parties
listed on Schedule "A" attached
hereto.

[Schedule "A" Of Those Served Omitted In Printing]

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[Title Omitted In Printing]

MOTION FOR DIRECTIONS
TO CLERK AND APPROVAL
OF (TEMPORARY) DEPOSITORY

COMES NOW HARVEY M. ALPER, Receiver in the above-captioned cause and moves the Court to direct the Clerk to deliver to such Receiver the interpleader funds held by the Clerk (in Registry) in the above-captioned cause, and to approve the Receiver's temporary depository for such funds, and as grounds therefore would show unto the Court as follows:

1. On July 21, 1977, the interpleader funds in this cause will mature in certificates of deposit held by the Clerk of this Court.

2. Unless such funds are on July 21, 1977, delivered to the Receiver, the Clerk will reinvest the same in further certificates of deposit, making such monies virtually inac-

cessible for from thirty (30) to ninety (90) days from said date.

3. The Clerk of the Court maintains all interest earned on such interpleader funds is to be remitted to the Clerk for the benefit of Seminole County, Florida, and use in such County's general revenue or other like-type funds.

4. Should the Clerk's position as to interest described in the immediately foregoing paragraph be sustained (pursuant to the provisions of *Florida Statutes,* Chapter 28), the parties to this cause will be deprived not only of all interest heretofore earned on the interpleader funds but also on all interest earned after July 21, 1977, upon such monies.

5. If the interpleader funds are delivered to the Receiver forthwith, all interest upon such funds will hereinafter accrue to the benefit of the parties to this cause and the County's claim thereto will terminate.

6. The Receiver intends to deposit such funds, upon their delivery to him, in short term (45 days or less) certificates of deposit in Seminole County, Florida, commercial banks. Thereafter, the Receiver will explore alternate investments of such funds which will maximize the interest to accrue for the benefit of the parties hereto. Such alternate investments include government bonds and longer term certificates of deposit.

7. The Receiver expects that he will question the Clerk's claim to all interest hereinbefore accrued. The Receiver anticipates that a hearing upon such issue will be scheduled before this Court at a later date.

8. The Receiver expects to invest the interpleader funds at a rate of return of not less than five (5%) percent per annum. The maximum yield now being earned by the

Clerk on longer length 101 day certificates of deposit is 4.81%.

9. The Receiver proposes to deposit the interpleader funds either in any one or more than one of the following banks:

| | | |
|---|---|---|
| Pan American Bank | – | Altamonte Springs |
| Barnett Bank | – | Altamonte Springs |
| Com Bank | – | Casselberry |

10. The Receiver proposes to deposit THREE THOUSAND ($3,000.00) DOLLARS of the interpleader funds in a checking account upon which the Receiver may draw to meet the expenses incurred by him in the course of his duties. Further, as to such sum, the Receiver proposes that his bond continue to be waived.

11. Time does not permit that notice of this Motion be given to all concerned in advance of the Court's consideration hereof.

WHEREFORE, the Receiver prays as follows:

A. That the Court direct the Clerk to deliver the interpleader funds, exclusive of accrued interest, to the Receiver upon July 21, 1977.

B. That the Court reserve ruling upon the rightful party entitled to the accrued interest earned upon the interpleader funds and direct the Clerk to hold such sums in the Registry of the Court in interest bearing accounts or certificates, until the Court makes a determination as to the same.

C. That the Court designate the following financial institutions qualified to each hold all or parts of the interpleader funds:

| | | |
|---|---|---|
| Pan American Bank | – | Altamonte Springs |
| Barnett Bank | – | Altamonte Springs |
| Com Bank | – | Casselberry |

D. That the Court continue to waive the Receiver's bond.

E. That the Court authorize the Receiver to deposit THREE THOUSAND ($3,000.000) DOLLARS of the interpleader funds at any one or more of the banks above-named and in a checking account(s) upon which the Receiver may draw to meet the expenses incurred by him in the course of discharging his duties.

LAW OFFICES OF ALPER & WACK

BY: /s/ Harvey M. Alper

HARVEY M. ALPER
165 Whooping Loop
Altamonte Springs, Florida 32701
Receiver
Telephone 305/831-4339

[Certificates Of Service Omitted In Printing]

[Title Omitted In Printing]

## ORDER WITH DIRECTIONS TO CLERK AND APPROVING (TEMPORARY) DEPOSITORY, ETC.

THIS CAUSE having come on to be heard by the Court, without argument or the presence of counsel, upon the Receiver's Motion for Directions To Clerk and Approval of (Temporary) Depository, and the Court having examined the official Court file and being otherwise fully advised in the premises, it finds as follows:

A. Time did not permit the tender of notice of hearing upon the Receiver's above-named Motion to all concerned.

B. The actions sought to be approved by the Receiver in his Motion for Directions To Clerk and Approval of (Temporary) Depository are for the benefit of all parties to this cause.

WHEREFORE, It is ORDERED AND ADJUDGED as follows:

1. The Clerk of this Court shall deliver the interpleader funds, exclusive of accrued interest, to the Receiver upon July 21, 1977.

2. The Court reserves ruling upon the rightful party entitled to the accrued interest earned upon the interpleader funds and therefore directs the Clerk to hold such sums in the Registry of the Court, in interest bearing accounts or certificates, until the Court makes a determination as to the same.

3. The Court designates the following financial institutions qualified to each hold all or parts of the interpleader

funds (provided they comply with the provisions of *Florida Statutes,* §69.031):

| | | |
|---|---|---|
| Pan American Bank | – | Altamonte Springs |
| Barnett Bank | – | Altamonte Springs |
| Com Bank | – | Casselberry |

Such funds shall be held initially in short term (45 days or less) certificates of deposit.

4. The Receiver's bond shall continue to be waived.

5. The Receiver may deposit THREE THOUSAND ($3,000.00) DOLLARS of the interpleader funds at any one or more of the banks above-named in a checking account(s) upon which the Receiver may draw to meet the expenses incurred by him in the course of discharging his duties.

6. The Receiver shall report back to the Court upon future possible investments of the interpleader funds.

DONE AND ORDERED in Chambers, Seminole County Courthouse, Sanford, Florida, this 19th day of July, 1977.

/s/ D. J. Salfi
Dominick J. Salfi, Circuit Judge

[Certificate Of Service Omitted In Printing]

[Title Omitted In Printing]

MOTION FOR ASSISTANCE AND INSTRUCTIONS

COMES NOW Harvey M. Alper, Receiver, and files this his Motion for Assistance and Instructions and shows unto the Court that he requires guidance in the several respects hereinafter set forth.

1. The Receiver is under a duty to "examine the file in this cause and determine from the file and the pleadings therein the number and amount of claims filed against the fund in interpleader and . . . (to) prepare and file with this Court and serve upon the parties shown in Schedule 'A', a list of such claims which shall identify the claimant, the amount of the claim, and whether the claim is or purports to be secured or unsecured and the nature of security for such claim." The Receiver would show unto the Court that the file in this cause is presently some thirteen volumes in length and growing almost daily. Such file may not be removed from the Seminole County Courthouse for more than two days at a time. To perform as required of him as aforesaid, the Receiver requires that he be permitted to remove all or part of such thirteen volumes from said Courthouse for extended periods in excess of two days so that he may make the necessary compilation. Further, with regard to such compilation, the Receiver requires instructions in the following particulars:

a. Is the Receiver to express any opinion to the Court on the validity of such claims, in law or in fact, or upon the validity of purported security therefore, if any?

b. Is the Receiver to limit his inquiry to the four corners of the Court file or is he empowered to make such additional investigations and incur

such consequential expenses of such investigation into facts and circumstances beyond the scope of the Court file itself as he may deem necessary?

2. The Receiver is aware of the fact that certain interpleader claims have or may be filed herein to which an Answer may be required. The Receiver believes that his role is that of an impartial third party and that he should not be required to Answer such claims or otherwise become involved with regard to the merits of this case. Notwithstanding the foregoing, the Receiver requests the Court's instructions as to whether or not the Court expects the Receiver to in any way become involved in an advocacy capacity as to the merits of this cause.

3. It has been suggested to the Receiver that he pay certain claims for taxes forthwith. The Receiver wishes instruction from the Court as to whether or not there are any claims, including claims for taxes, which the Receiver should pay forthwith and without further (detailed) instruction from the Court.

4. At the suggestion of the Clerk of this Court the Receiver has deposited the interpleader monies with an institution willing to make a "pledge of security" therefore. The Receiver advises the Court that in obtaining a "pledge of security" the Receiver must, of necessity, agree to accept a lower interest rate than would otherwise be paid upon the interpleader fund. Further, the Receiver could increase the return available on the interpleader fund by investing the same for periods of maximum possible length. The Receiver could also possibly increase the yield on such funds by purchasing U.S. Treasury notes rather than dealing with a financial institution designated under *Florida Statutes* 69.031. Consequently, the Receiver asks as follows:

a. Should the Receiver insist on a pledge of security for the interpleader fund or may such monies be invested without such security in otherwise approved institutions?

b. What is the maximum practical length for which the Receiver may commit and invest the interpleader funds?

c. May the Receiver purchase U.S. Treasury notes direct rather than deal with a financial institution designated under *Florida Statutes* 69.031?

5. The Clerk of this Court has refused to remit to the Receiver in excess of NINETY ONE THOUSAND ($91,000.00) DOLLARS which sum constitutes all interest earned upon the interpleader fund while the same remained in the Clerk's custody. The Clerk cites *Florida Statutes* 28.33 as authority for such action. The Receiver believes that such action by the Clerk may be improper and therefore inquires of the Court as follows:

a. Should the Receiver institute a separate action against Arthur Beckwith, Jr., as Clerk of this Court, for payment over to the Receiver of the interest above-mentioned?

b. Should the Receiver institute and will the Court entertain a motion in the present proceedings for an order directing the said Clerk to remit to the Receiver the interest above-mentioned?

c. Should the Receiver do nothing with regard to the interest on the interpleader fund which has been retained by the said Clerk?

6. The Receiver requires authority and authorization to charge the interpleader fund for direct expenses incurred by him in this cause and requests that the Court instruct that he may be paid by such fund, from time to time and without further application to the Court, for postage, photocopies, travel and like and similar type expenses, reporting such expenditure to the Court periodically.

WHEREFORE, the Receiver files this his Motion for Assistance and Instructions and requests that the Court give him the guidance herebefore requested.

/s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
165 Whooping Loop
Altamonte Springs, Florida
As Receiver
Telephone 305/831-4339

[Certificate Of Service Omitted In Printing]

[Title Omitted In Printing]

## ORDER

THIS CAUSE having come onto be heard on the Receiver's Motion for Assistance and Instructions on the 11th day of August, 1977, at 4:15 P.M., and the Receiver having appeared before the Court by telephone, and attorneys for interested parties having been present before the Court, and the comments and arguments of counsel having been heard, it is ordered and adjudged as follows:

1. The Receiver may remove the official Court file in this cause, or any one or more volumes thereof, from the Courthouse at Sanford to his office and places of work for periods not to exceed seven (7) consecutive days per volume.

2. The Receiver shall report back to the Court, at the earliest practical date, and shall advise the Court in written form of the name of each claimant in this cause, the date such claimant's claim was filed with the Court, the purported basis of such claim and whether or not the claim purports to be secured or unsecured and whether or not some other priority interest is asserted.

3. The Receiver shall not, without further permission of the Court, employ any outside investigator to assist him in his work in this cause.

4. The Receiver has inquired of the Court at numbered paragraph 2 of his Motion for Assistance and Instructions as to whether or not the Court expects the Receiver to in any way become involved in an advocacy capacity as to the merits of this cause. Such question is answered in the negative and the Receiver shall conduct himself accordingly.

5. The Receiver shall endeavor to pay off all claims of Florida County Governments for tangible personal property taxes at the earliest practical date. Toward such end, the Receiver shall contact each concerned County Tax Collector, confirm the amount of tax claimed due, and thereafter make such necessary and appropriate arrangements as are indicated to satisfy valid tax claims.

6. The Receiver shall not invest the receivership funds other than pursuant to *Florida Statute* 69.031, and toward such end the Receiver shall not directly invest in and purchase for his own account U.S. Treasury Notes.

7. The Receiver shall continue to endeavor to invest the receivership funds in secured situations and the Receiver shall make no investment of receivership funds without a pledge of security for such funds from the financial institution designated pursuant to *Florida Statute* 69.031.

8. Until such time as the Receiver has reported to the Court upon alternate or preferred investments of the receivership funds, the Receiver is authorized to and shall leave on deposit with the Barnett Bank of Seminole, N.A., 460 East Altamonte Drive, Altamonte Springs, Florida, the receivership funds, upon essentially the same terms as set forth in the receipt of the depository heretofore filed with this Court. The foregoing notwithstanding, the Receiver shall endeavor to obtain increased yield upon such registry funds.

9. The Receiver shall institute and the Court will consider entertaining a Motion in the present proceedings for an Order directing the Clerk of this Court to remit to the Receiver the sum of approximately NINETY-ONE THOUSAND ($91,000.00) DOLLARS, which sum constitutes all interest earned upon the interpleader fund while the same remained in the Clerk of this Court's custody,

and to which fund the Clerk of this Court asserts a right pursuant to *Florida Statute* 28.33.

10. The Receiver is herewith authorized to charge the interpleader fund for direct expenses incurred by him in this cause and he may pay from such fund from time to time, sums for postage, photocopies, travel and like and similar type expenses, provided, however, that such expenditures from the interpleader funds shall be reported to this Court every sixty (60) days if and when the same are made.

DONE AND ORDERED at the Courthouse in Sanford this 26th day of August, 1977.

D.J. Salfi
CIRCUIT JUDGE

[Certificate Of Service Omitted In Printing]

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[Title Omitted In Printing]

MOTION FOR DIRECTION TO CLERK TO REMIT CERTAIN MONIES TO RECOVER

COMES NOW Harvey M. Alper, Receiver in the above captioned cause, and moves the Court to direct the Clerk of this Court to deliver to such Receiver the sum of NINETY-ONE THOUSAND FOUR HUNDRED SEVENTY-FOUR AND 71/100 ($91,474.71) DOLLARS, which sum constitutes all interest earned upon the interpleader fund in this cause while the same remained in the custody of the Clerk of this Court, and as grounds therefore would show unto the Court as follows:

1. The only compensation to which the Clerk of this Court is properly entitled has heretofore been paid to the Clerk, such sum being a statutory fee of one (1%) per cent on the first five hundred dollars placed with the Clerk and a statutory fee of one-half (1/2) per cent of the balance placed on deposit with the Clerk. Such fee is calculated upon the principal sum originally placed in the registry of the Court.

2. The Clerk's claim to the interest earned upon the registry funds is apparently asserted upon the basis of Florida Statute §28.33. Such statute, however, pertains only to the investment of County funds and funds placed with the Clerk in the registry of the Court are not County funds as such and thus such registry funds and the interest earned thereon may not be "deemed income of the office of the Clerk of the Circuit Court investing such monies" within the meaning and intent of Florida Statute §28.33.

3. There is no case law within the State of Florida supporting the Clerk's position that he is entitled to retain the interest upon the registry funds as income of his office.

4. The provisions of Florida Statute §28.33 regarding the deposit of registry monies to the effect that "monies deposited in the registry of the Court shall be deposited in interest-bearing certificates of the discretion of the Clerk, subject to the above guidelines" in no way incorporates the language which follows in such statute that "all interest accruing from monies deposited shall be deemed income of the office of the Clerk of the Circuit Court." The latter language refers to public monies *only*. Furthermore, the reference to registry funds in Florida Statute §28.33 is not intended to make privately placed interpleader or registry funds public funds. Instead, it is intended, to establish a specific standard of conduct – one that directs that the

Clerk shall handle all monies placed with him in the registry of the Court at the same high standard as if the same were County Funds, holding such monies [in] sacred trust and in protected investments. [sic]

WHEREFORE, the undersigned Receiver requests that this Court enter an Order instructing the Clerk of this Court, Arthur H. Beckwith, Jr., to deliver to him the sum of $91,474.71 for deposit by the Receiver in interest-bearing accounts for the benefit of creditors herein. Further, the undersigned Receiver requests that this Court also Order that the Clerk deliver to him all interest accrued upon such $91,474.71 since July 21, 1977.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to all individuals on Schedule "A" attached hereto as well as to Arthur H. Beckwith, Jr., Seminole County Courthouse, Sanford, Florida, this 15th day of September, 1977.

LAW OFFICES OF ALPER AND WACK

BY: /s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
165 Whooping Loop
Altamonte Springs, Florida 32701
As Receiver
Telephone 305/831-4339

[Schedule "A" Of Those Served Omitted In Printing]

[Title Omitted In Printing]

NOTICE OF TEMPORARY WITHDRAWAL OF MOTION FOR DIRECTION TO CLERK TO REMIT CERTAIN MONIES TO RECEIVER

TO: All those individuals listed
on attached Schedule A

PLEASE TAKE NOTICE that the Motion For Direction To Clerk To Remit Certain Monies To Receiver filed by the undersigned on September 15, 1977, is herewith temporarily withdrawn. The Receiver anticipates that a lengthier speaking motion on the same subject matter, wherein constitutional issues will be raised with specificity, will be filed with the Court in the near future.

PLEASE GOVERN yourself accordingly.

DATED this 7th day of November, 1977.

LAW OFFICES OF ALPER & WACK

BY: /s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
165 Whooping Loop
Altamonte Springs, Florida 32701
Telephone 305/831-4339
As Receiver

[Certificate of Service and Schedule A
of Those Served Omitted In Printing]

[Title Omitted In Printing]

## RECEIVER'S FIRST AMENDED MOTION FOR DIRECTION TO CLERK TO REMIT CERTAIN MONIES TO RECEIVER

COMES NOW Harvey M. Alper, Receiver in the above-captioned cause and moves the Court to direct the Clerk of this Court to deliver to such Receiver the sum of $91,474.71, plus all accrued interest thereon from date of July 21, 1977, which sum constitutes all interest earned upon the interpleader fund while the same remained in the custody of the Clerk of this Court (as well as all compounded interest from July 21, 1977, forward), and as grounds therefore would show unto the Court as follows:

1. The only compensation to which the Clerk of this Court is properly entitled has heretofore been paid to the Clerk, such sum being a statutory fee of one (1%) per cent on the first $500.00 placed on deposit with the Clerk and a statutory fee of one-half (1/2%) per cent of the balance placed with the Clerk. Such fee is calculated only upon the principal sum originally placed in the registry of the Court pursuant to *Florida Statute* §28.24.

2. The Clerk's claim to the interest earned upon the registry funds is apparently asserted upon the basis of *Florida Statute* §28.33. Such Statute, however, pertains only to the investment of County funds. Funds placed with the Clerk in the registry of the Court are not County funds as such and thus such registry funds and the interest earned thereon may not be "deemed income of the Clerk of the Circuit Court investing such monies" within the meaning and intent of *Florida Statute* §28.33. Indeed, the title of such Statute is "Investment of county funds." Registry monies are not even mentioned. Further the

Statute does not include registry funds with County funds by its own express terms. Rather, after outlining the basis upon which County funds are to be invested, the Statute states (almost parenthetically) and in a separate and distinct sentence, "Money deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the *above guidelines.*" (Emphasis Added) The balance of the Statute speaks to County funds and, at best, can be called, as the Statute itself says, a "guideline" – but not an imperative – as to the terms upon which registry funds may be invested.

3. It is further and similarly urged that the provisions of *Florida Statute* §28.33 regarding the deposit of registry monies which states that "monies deposited in the registry of the Court shall be deposited in interest bearing certificates at the discretion of the Clerk, subject to the above guidelines" in no way incorporates the language which follows in such Statute that "all interest accruing from monies deposited shall be deemed income of the office of the Clerk of the Circuit Court." The latter language refers to public monies *only.* The reference to registry funds in *Florida Statute* §28.33 does not make privately placed funds subject to temporary public custody into public funds – for such would be a taking of private property without due process of law. Instead, the Statute establishes a standard of conduct for the Clerk when he holds private monies in sacred trust. This standard happens to be the same high standard impressed upon the Clerk when he holds public funds.

4. There is no case law within the State of Florida supporting the Clerk's position that he is entitled to retain the interest upon the subject registry funds as income of his

office. Presumably the Clerk relies upon an opinion or opinions of the Attorney General as supporting his position. If applicable and existent, such opinions would at best be persuasive and are not binding upon this Court.

5. Assuming arguendo that *Florida Statute* §28.33 actually intends that all interest earned upon Court registry funds shall be retained for public use, then the same is unconstitutional on the grounds that such Statute is an invasion of the realm of the Judiciary by the Legislature. Under Florida's Constitution the Judicial power is vested in and reserved to the Courts. Under our long and well established doctrine of separation of powers the Legislature may not invade the province of the Judiciary by directing how the Judiciary shall exercise its inherent powers. The power of this Court to hold money or property in its registry, or otherwise, is such an inherent power. Were there no *Florida Statute* §28.33, the Court could still hold the registry funds held herein and the Court could do so upon such terms as it deemed just. The Legislature may not abrogate such inherent power by passing a statute which arguably and as the Clerk would here apply it, obviously, invades the province of this Court in the exercise of its inherent equitable powers. Thus, it is stated at Article II, Section 3, of the 1968 *Florida Constitution:*

> *The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.* (Emphasis Added).

It is a fundamental rule of statutory construction that wherever possible the Courts shall construe statutes in such a fashion as to protect their constitutionality in-

asmuch as it is presumed that the Legislature does [not] intend to enact any unconstitutional law. [sic]. Thus, in light of the foregoing, and in the interests of preserving its constitutionality, this Court is constrained to interpret the provisions of *Florida Statute* §28.33 as being purely guidelines to the Clerk on the care necessary when handling private registry funds and, further, as being wholly inapplicable insofar as the same might otherwise be held to mean that interest earned on registry funds is public money.

6. Assuming arguendo that *Florida Statute* §28.33 may be construed to mean that all interest earned upon Court registry funds shall be retained for public use and as public money, then such Statute must be held void for vagueness because it is, upon its face, susceptible of numerous different and conflicting interpretations and because its purpose and intent are confused and unclear. In further support of this numbered paragraph the Receiver will show to the Court, if the Court permits the Receiver to take testimony upon the strength of a separate motion filed herewith, that the Clerks of the various judicial circuits in Florida interpret and apply *Florida Statute* §28.33 in many varied and conflicting ways. Upon information and belief the Receiver advises the Court by way of example only, that Court Clerks variously:

a) refuse to invest registry monies in interest-bearing accounts at all, thereby avoiding the problem raised herewith;

b) remit interest on registry funds to the recipients of the principal sum automatically;

c) remit interest on the registry funds to the recipients of the original sum only if directed by the Court;

d) hold registry funds as the Court may direct on whatever terms and conditions the Court sees fit;

e) retain all interest on registry funds as public monies; and

f) invest registry funds in interest bearing accounts only if the Court so directs, remitting the interest thereon to private persons only if the Court so directs.

7. Upon the basis of the varied interpretations being made of *Florida Statute* §28.33, as more fully set forth at the foregoing numbered paragraph six, said Statute must be held unconstitutional as applied both because as the Clerk of this Court would apply such Statute there would be a taking of property without due process of law and because such law does not uniformly and equally protect and treat all of the citizens of this State, thereby depriving citizens of equal justice under law.

8. *Florida Statute* §28.33 is void because it violates the provisions of the 1968 *Florida Constitution,* Article III, Section 6, which provides:

> Every law shall embrace but one subject and matter properly connected therewith . . .

*Florida Statute* §28.33 clearly embraces two unrelated subjects — i.e. private registry money and property held by the Clerk as well as public funds held by the Court.

9. *Florida Statute* §28.33 must be read in pari materia with the provisions of the *Uniform Commercial Code* under which the instant action was brought, and particularly *Florida Statute* §676.6-106. One avowed purpose and philosophy of the pertinent portions of the Uniform

Commercial Code is to protect creditors. Thus, it is stated at *Florida Statute* §676.6-106 (1) "it is the duty of the transferee to assure that . . . consideration is applied so far as is necessary to pay those debts of the transferor." It is therefore unreasonable to interpret the two above-mentioned Statutes together if the result does not effect maximum protection of the creditors, especially where to do so would be to reach a conclusion contrary to the philosophy and tenor of a uniform and integrated act.

10. Any interpretation of *Florida Statute* §28.33 which, in this cause, would leave the creditors without the benefit of accrued interest upon the receivership funds is especially unreasonable because of the unique facts of this case. Legal title to this money passed to the creditors once the money was unconditionally paid into the Court's registry. *Phipps et al. v. Watson,* Sup. Ct. Fla. 147 So 234 (1933). Once this action occurred, the Court could immediately have named a receiver or delivered the funds to the trustee in bankruptcy, in either of which cases all accrued interest would without doubt, from that date forward, have accrued for the benefit of creditors and not the Clerk. It is unreasonable to believe that the mere act of leaving these funds with the Clerk of itself operates to reduce the funds available to the creditors by approximately $100,000. This consideration is made all the more significant in light of the fact that the Clerk has indisputably already received still another fee for handling this money; this other fee being in the amount of $9,228.74, and being calculated upon the strength of *Florida Statute* 28.24. Such Statute provides for certain service charges by the Clerk including a charge "for receiving money into the registry of Court." Thus, if the Clerk may keep both interest accrued and the service charge, the creditors will receive less money from

the Court than was originally paid into its registry, a manifestly unjust and inequitable result.

WHERFORE, the undersigned Receiver requests that this Court enter an Order instructing the Honorable Clerk of this Court, Arthur H. Beckwith, Jr., to deliver to him the sum of $91,474.71 for deposit by the Receiver in interest-bearing accounts for the benefit of creditors herein. Further, the undersigned Receiver requests that this Court also Order that the Clerk deliver to him all interest accrued upon such $91,474.71 since July 21, 1977.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to all individuals on Schedule "A" attached hereto as well as to the Honorable Arthur H. Beckwith, Jr., Seminole County Courthouse, Sanford, Florida, this 14th day of March, 1978.

LAW OFFICES OF ALPER & WACK

BY: /s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
165 Whooping Loop
Altamonte Springs, Forida 32701
305/831-4339
As Receiver

[Schedule "A" Of Those Service Omitted In Printing]

[Title Omitted In Printing]

## FIRST SUPPLEMENT TO RECEIVER'S FIRST AMENDED MOTION FOR DIRECTION TO CLERK TO REMIT CERTAIN MONIES TO RECEIVER

COMES NOW Harvey M. Alper, Esquire, Receiver, and for supplement to his First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver, says:

1. The retention of interest earned on the receivership fund (the monies deposited into the registry of this Court) by the Clerk of this Court constitutes the imposition of an illegal and unconstitutional tax. Such tax is ultimately imposed and used for the benefit of County government.

WHEREFORE, the undersigned Receiver files this Supplement and renews his request that this Court enter an Order instructing the Honorable Clerk of this Court, Arthur H. Beckwith, Jr., to deliver to him the sum of Ninety One Thousand Four Hundred Seventy Four and 71/100 ($91,474.71) Dollars for deposit by the Receiver in interest-bearing accounts for the benefit of creditors herein. Further, the undersigned Receiver requests that this Court also Order that the Clerk deliver to him all interest accrued upon such Ninety One Thousand Four Hundred Seventy Four and 71/100 ($91,474.71) Dollars since July 21, 1977.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to all parties listed on the attached Schedule "A" this 7th day of June, 1978, and by hand delivery to Harry A. Stewart.

/s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE
LAW OFFICES ALPER & WACK
165 Whooping Loop
Altamonte Springs, Florida 32701
(305) 831-4339

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IN THE CIRCUIT COURT IN AND FOR THE EIGHTEENTH JUDICIAL CIRCUIT, SEMINOLE COUNTY, FLORIDA.

CIVIL ACTION NO. 76-354-CA-17-EE

ECKERD'S OF COLLEGE PARK, INC.,

Plaintiff,

vs.

WEBB's FABULOUS PHARMACIES, INC., et al.,

Defendants.

---/

## ORDER

This cause came on to be heard on the Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1134), together with Receiver's Memorandum in Support of Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1223), Errata Sheet to Receiver's Memorandum in Support of Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1225), Memorandum in Opposition to Receiver's First Amended Motion for Direc-

tion to Clerk to Remit Certain Monies to Receiver (Record, Page 1251), and Receiver's Memorandum in Reply to Memorandum in Opposition to Receiver's First Amended Motion for Direction to Clerk to Remit Certain Monies to Receiver (Record, Page 1262). Having carefully considered said Motion, Memoranda, and Errata the Court finds and it is accordingly

ORDERED AND ADJUDGED that the Clerk of this Court is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court pursuant to the Court's order recorded July 12, 1976 in Official Records Book 1091, Page 0494, of the Public Records of Seminole County, Florida; the creditors herein are the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court. It is further

ORDERED AND ADJUDGED that having determined only those issues listed in Paragraphs c. and 3. of the Limited Order of Recusal entered June 20, 1978, and the Order of Reassignment entered by the Chief Judge [on] June 26, 1978, the undersigned hereby defers to the Honorable Dominick J. Salfi, the Judge regularly assigned to this case, determination of whether to grant the aforementioned Receiver's First Amended Motion for Direction to the Clerk to Remit Certain Monies to Receiver. [sic]

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 24th day of July, 1978.

/s/ Kenneth M. Leffler
Kenneth M. Leffler
CIRCUIT JUDGE

[Certificate Of Service Omitted In Printing]

[Title Omitted In Printing]

## RECEIVER'S MOTION FOR NUNC PRO TUNC ORDER CORRECTING OMISSION FROM THE RECORD

Receiver Harvey M. Alper moves this Court, pursuant to *Fla.R.Civ.P.* 1.540(a) and *Fla.App.Rule* 9.130(f) or 9.600(a), for a nunc pro tunc order setting forth the grounds upon which it determined by Order dated July 24, 1978, that the creditors herein are the rightful parties entitled to all interest earned on the interpleader fund while deposited in the registry of the Court, and particularly whether the Court directly passed on the validity of *Florida Statutes* §28.33 or expressly construed a provision of the State or Federal Constitution in the rendition of said Order, and as grounds therefore, shows the Court as follows:

1. Pursuant to the Limited Order of Recusal entered herein on June 20, 1978, the Honorable Kenneth M. Lefler entered an Order on July 24, 1978, finding that the creditors herein, not the Clerk of this Court, are entitled to the interest earned on the interpleader fund while deposited in the Registry of this Court. This Order omitted to set forth the grounds upon which it was based.

2. By Order dated August 1, 1978, this Court directed the Clerk of the Circuit Court to deliver the monies in dispute to the Receiver.

3. On August 9, 1978, Defendant Arthur H. Beckwith, Jr., Clerk of the Circuit Court and Defendant Seminole County, Florida filed a Notice of Appeal to the Fourth District Court of Appeals herein, appealing the Orders rendered July 24, 1978 and August 1, 1978. On August 9,

1978, these Defendants filed an Amendment to Notice [of] Interlocutory Appeal. [sic]

4. In his motions and memoranda filed herein, the Receiver has asserted that *Florida Statutes* §28.33 is unconstitutional as it pertains to deposits in the Court Registry for a number of reasons, including that it directs the taking of private property without due process of law, that it violates the constitutional separation of powers between the legislative and judicial branches, and that it provides for an unconstitutional tax. In the alternative, the Receiver has asserted that a proper construction of the above described constitutional limitations as they pertain to *Florida Statutes* §28.33 would also require a finding for the Receiver herein.

5. Without knowing the basis of the Court's Order of July 24, 1978, the Receiver is uncertain whether the Supreme Court of Florida or Fourth District Court of Appeal is the proper appellate forum for the appeal taken herein. If the Court's Order was based on the invalidity of *Florida Statutes* §28.33 or an express construction of a provision of the State or Federal Constitution, then the Supreme Court of Florida and not the Fourth District Court of Appeals would be the proper appellate forum for the appeal filed by the Defendants herein. See *Fla.App.-Rule* 9.030.

6. Although a trial court is not required to state grounds of reasoning in its orders, in cases such as this, where such grounds may be determinative of the proper appellate forum, fairness to litigants and appellate courts make this important and desirable. See *Suratt v. Fleming,* 309 So.2d 614 (Fla., 1975, 1st DCA); *Cohen v. State,* 121 So.2d 155 (Fla., 1960).

7. This Court presently has concurrent jurisdiction with the Fourth District Court of Appeal to render Orders on procedural matters relating to this cause. See *Fla.App. Rule* 9.130(f) or 9.600(a) and *Fla.R.Civ.P.* 1.540(a). Until such time as jurisdiction of this cause rests exclusively with the Fourth District Court of Appeal, this Court has authority to correct omissions in the record on its own initiative or on the motion of any party. See *Fla.R.Civ.P.* 1.540(a): 2 *Fla.Jur.*, Appeals §136 (1963); *Liberman v. Rhyne,* 248 So.2d 242 (Fla., 1971, 3 DCA).

8. Inasmuch as the Honorable Kenneth M. Leffler, pursuant to the Limited Order of Recusal entered on June 20, 1978, determined the issue of entitlement to the money in dispute herein, this Motion is directed to the Honorable Kenneth M. Leffler.

9. Failure to grant this Motion could unduly prejudice all parties to the pending appeal. If the basis for this Court's Order of July 24, 1978, would vest appellate jurisdiction in the Supreme Court of Florida, then failure to include such basis in the record herein could result in the parties having to undertake the pending appeal at two appellate levels instead of one.

WHEREFORE, Receiver Harvey M. Alper prays that this Court enter a Nunc Pro Tunc Order setting forth the grounds for its Order of July 24, 1978 and particularly whether or not this Court directly passed on the validity of *Florida Statutes* §28.33 or expressly construed a provision of the State or Federal Constitution in arriving at such decision.

LAW OFFICES OF ALPER & WACK

BY: /s/ William H. Wack
HARVEY M. ALPER, ESQUIRE
165 Whooping Loop
Altamonte Springs, Florida 32701
305/831-4339
As Receiver

[Certificate Of Service Omitted In Printing]

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA.

CASE NO. 76-354-CA-17-EE

ECKERD'S OF COLLEGE PARK, INC.,

Plaintiff,

vs.

WEBB'S FABULOUS PHARMACIES, INC., ET AL.,

Defendants.

_____/

## ORDER

THIS CAUSE having come on to be heard on August 23, 1978, on the Receiver's Motion for Nunc Pro Tunc Order Correcting Omission from the Record and the Court being fully advised in the premises, finds, as follows:

1. Pursuant to Florida Rule of Civil Procedure 1.540(a) and Florida Appellate Rule 9.130(f), this Court has jurisdiction pending appeal to amplify its Order, dated July 24, 1978, by setting forth the grounds upon which such Order was based. It is particulary incumbent upon this Court to do so in light of the constitutional issues raised herein which may be determinative of the proper appellate forum for the pending appeal.

2. The Order, dated July 24, 1978, and entered by the undersigned Judge, is amended nunc pro tunc by the addition of the following language:

> ORDERED and ADJUDGED that Florida Statutes § 28.33 and Laws of Florida, Chapter

73-282 are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the court in this case.

DONE and ORDERED in Chambers at the Courthouse in Sanford, Florida, this 23d day of August, A.D., 1978.

/s/ Kenneth M. Leffler
Kenneth M. Leffler
CIRCUIT JUDGE

[Certificate of Service and Approval As to Form By Counsel Omitted In Printing]

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[Title Omitted In Printing]

SECOND AMENDMENT TO NOTICE OF APPEAL

NOTICES filed August 9, 1978, and August 10, 1978, and August 10, 1978, are hereby amended to read that Defendants, ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT, and SEMINOLE COUNTY, FLORIDA, appeal to the District Court of Appeal, Fourth District, the Orders of this Court rendered July 24, 1978, August 1, 1978, and August 23, 1978. The nature of the Orders are final, declaring Section 28.33, Florida Statutes, to be unconstitutional, determining the right to immediate possession of property and directing the Clerk of the Circuit Court to deliver the sum of $91,474.71, plus any accrued interest to Receiver, HARVEY M. ALPER.

I HEREBY CERTIFY that a true and correct copy of the above have been furnished by U.S. Mail this 24th day of August, A.D., 1978, to all counsel listed on the attached Schedule "A."

/s/ Harry A. Stewart
HARRY A. STEWART, ESQUIRE
County Attorney
Room 302
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North Park Avenue
Sanford, Florida 32771
Telephone: (305) 323-4330
Attorney for Defendants
Beckwith and Seminole County

[Schedule "A" Of Those Served Omitted In Printing]

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The decision of the Supreme Court of Florida in this cause appears in the Appellants Jurisdictional Statement at Appendix C thereof, as well as at 374 So2d 951-953 (1979). The decision also appears as Appendix A attached to Appellants brief.

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Supreme Court, U.S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

in the

# Supreme Court

of the

# United States

## NO. 79-1033

WEBB'S FABULOUS PHARMACIES, INC.,
and ECKERD'S OF COLLEGE PARK, INC., et al
*Appellants,*

*vs.*

ARTHUR H. BECKWITH, JR.,
CLERK OF THE CIRCUIT COURT,
and SEMINOLE COUNTY, FLORIDA,
*Appellees.*

## ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

## MOTION TO DISMISS OR AFFIRM

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in the

# Supreme Court

of the

# United States

---

**No. 79-1033**

WEBB'S FABULOUS PHARMACIES, INC.,
and ECKERD'S OF COLLEGE PARK, INC., et al
*Appellants,*

*vs.*

ARTHUR H. BECKWITH, JR.,
CLERK OF THE CIRCUIT COURT,
and SEMINOLE COUNTY, FLORIDA,
*Appellees.*

---

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA**

---

## MOTION TO DISMISS OR AFFIRM

---

## INTRODUCTION

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the appeal does not present a substantial federal question and the federal question sought to be reviewed was not timely or properly raised or expressly passed on by the Florida Supreme Court. Rule 16 (1)(b), (c) and (d).

## I.

## THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

### A. The Statute

This appeal raises the question of the validity of Section 28.33, Florida Statutes (enacted by Chapter 73-282, Laws of Florida), which provides in pertinent part as follows:

> "The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits . . . *Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys* and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. . . ." (Emphasis supplied.)

### B. The Proceedings Below

Eckerd's of College Park, Inc., (Eckerd's) entered into an agreement to purchase the assets of Webb's Fabulous Pharmacies, Inc. (Webb's). Pursuant to Sec-

tion 676.106(4), Florida Statutes, Eckerd's then filed a complaint in interpleader in the Circuit Court (trial court) below, interpleading Webb's and Webb's creditors, and tendered the purchase price into the Circuit Court registry. Subsequently, on its own motion, the Circuit Court appointed a Receiver to determine the number and amount of claims filed against the monies in interpleader and to investigate the establishment of an account or accounts in which to deposit the monies.

The Circuit Court, on Eckerd's motion, then ordered that the purchase price be paid to the Clerk of the Circuit Court to be deposited in an interest-bearing account and reserved ruling on whether the interest earned would accrue to the benefit of the Clerk's office. The purchase price was accordingly delivered to the Clerk, who in turn deposited the monies in interest-bearing accounts.

Thereafter, on the Receiver's motion, the Circuit Court ordered that the monies in interpleader be delivered by the Clerk of the Circuit Court from the registry to the Receiver and directed the Clerk to continue to hold the accrued interest from the monies in the registry until a determination of the rightful party to receive the interest could be made. The Clerk paid the monies to the Receiver.

The Receiver then filed a motion to direct the Clerk of the Circuit Court to pay to the Receiver the interest accrued on the monies in interpleader while deposited in the Circuit Court registry. In response to this motion, the Circuit Court ultimately ordered the Clerk to pay the interest to the Receiver and held Section 28.33, Florida Statutes, to be unconstitutional "to the extent

that the provisions thereof pertain to private monies held in the registry of the court. . . ."

The Clerk of the Circuit Court and Seminole County, Florida, appealed the Circuit Court's order to the Florida Supreme Court, which reversed and held Section 28.33, Florida Statutes, to be constitutional. *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (1979). It is from the decision of the Florida Supreme Court that the Appellants have taken this appeal.

## II.

## ARGUMENT

### A. The Question Presented Is So Unsubstantial As Not To Warrant Further Argument

Appellants in their Jurisdictional Statement argue in part that the application of Section 28.33, Florida Statutes, to the facts of this case results in a taking of property without just compensation in violation of the Fifth and Fourteenth (Due Process Clause) Amendments of the United States Constitution. In support of this argument, Appellants cite judicial decisions from other jurisdictions in which particular statutes were construed and applied to various fact situations.

In response, it is fundamental that, where the validity of a state statute has been sustained in the face of federal objections, this Court on appeal must accept the state court's construction of the statute and proceed to test its validity on that basis. *Hortonville J.S.D. No. 1 v. Hortonville Ed.*, 426 U.S. 482 (1976); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959). In this case, the Florida Supreme Court construed Section 28.33, Florida Statutes, to be applicable to interpleader monies deposited in the registry of the Circuit Court, such monies being considered "public money" while so deposited. See *Money v. State ex rel. Florida First National Bank*, 206 So.2d 436 (Fla. 1968); Section 219.01(2), Florida Statutes.

The Florida Supreme Court also found that, in the absence of the investment requirement of Section 28.33,

Florida Statutes, interest would not necessarily accrue on such interpleader monies, there being no common law right to interest on disputed funds deposited in court pending the outcome of litigation as to their ownership. See *Phillips Petroleum Co. v. Adams,* 513 F.2d 355 (5th Cir.), *cert. denied,* 423 U.S. 930 (1975); *Monarch Tile Sales v. Frost National Bank of San Antonio,* 496 S.W.2d 254 (Tex.Ct.App., 1973); 47 C.J.S. *Interest* §54 (1946); and Annot., 15 A.L.R.2d 473 (1951). As stated by the Florida Supreme Court, Section 28.33 "takes only what it creates." 374 So.2d at 953.

In contrast, the cases relied on by Appellants in their Jurisdictional Statement primarily concern situations in which there was either (1) a legislative direction or impediment which required payment of interest earned on monies held by a public officer to a designated recipient other than the public officer or general fund, but not necessarily to the person entitled to the principal; or (2) an absence of statutory direction as to the disposition of such interest, in which event the interest naturally flowed with the principal.

An example of the first category is *Metropolitan Water Dist. v. Adams,* 32 Cal.2d 620, 197 P.2d 543 (1948), in which the California Supreme Court construed the applicable statute to require that interest earned on funds deposited by a public agency in condemnation proceedings be paid to that public agency, and not to the general fund or to the condemnee ultimately receiving the funds. See also *Ostly v. Saper,* 147 Cal.App.2d 671, 305 P.2d 946 (1957); *Board of Law Library Trustees v. Lowery,* 67 Cal.App.2d 480, 154 P.2d 719 (1945); *Ponoma City School District v. Payne,* 9 Cal.App.2d 510, 50 P.2d 822 (1935); and *Lawson v.*

*Baker,* 220 S.W. 260 (Tex.Ct.App. 1920). Even the Texas Supreme Court's decision in *Sellers v. Harris County,* 483 S.W.2d 242 (Tex. 1972), upon which Appellants greatly rely, was based on the applicable statute's designation of the monies involved as "trust funds," thereby precluding their treatment as "county funds."

An example of the second category is *Bordy v. Smith,* 150 Neb. 272, 34 N.W.2d 331 (1948), in which the Nebraska Supreme Court found no statute directing the disposition of interest earned on tax foreclosure bids while deposited with the district court clerk. Thus, consistent with the general rule that where there is no statute to the contrary, interest becomes a part of the fund by whose investment it was produced, the Court held that the interest should go to the persons who deposited the bids. See also *Kiernan v. Cleland,* 47 Ida. 200, 273 P. 938 (1929); *Drainage Dist. No. 2 v. Ada County,* 38 Ida. 778, 226 P. 290 (1924); *University of South Carolina v. Elliott,* 248 So.C. 218, 149 S.E.2d 433 (1966); and *State v. McFetridge,* 84 Wis. 473, 54 N.W. 1 (1893).

Also included in the second category is the decision of this Court in *United States v. MacMillan,* 253 U.S. 195 (1920), referred to in the Appellants' Jurisdictional Statement. There, this Court cited its previous decision in *United States v. Mason,* 218 U.S. 517 (1910), to the effect that fees and emoluments received by a federal district court clerk were not within the purview of general federal statutes governing the handling of public monies of the United States, but were "allowed him for his compensation and office expenses under the statutes defining his rights and duties." 253 U.S. at 204.

Accordingly, this Court held that interest earned on the clerk's fees and emoluments was not subject to those general statutes either. It was also noted that, under the applicable rules, a litigant could apply to a federal district court to direct the allowance of interest on money deposited with that court and "to provide for its payment by the clerk when the request is granted." 253 U.S. at 205.

As can be seen, therefore, the Appellants' reliance on this Court's decision in *MacMillan* and the other decisions cited in their Jurisdictional Statement is misplaced. Those decisions concerned primarily the proper meaning and application of the particular statutes there involved. The results of the cases varied depending on the judicial construction given those statutes. However, in most cases in which an applicable legislative scheme for the investment of monies being held by a public officer and the disposition of the interest earned on them was found to exist, the court gave effect to that scheme, even if the required disposition of the interest was to someone other than the recipient of the principal. See, e.g., *Metropolitan Water Dist. v. Adams, supra.*

Such judicial implementation of the applicable legislative scheme, in apparent recognition of the fact that the interest in issue existed only because of that scheme, has also prevailed where, as here, the required disposition of the interest was to the office of the public officer involved or the general fund. Thus, for example, in *Locasio v. Rosewell,* 50 Ill.App.3d 794, 365 N.E.2d 949 (1977), the plaintiffs-condemnees sought the interest earned on funds deposited by the condemning authorities with the county treasurer during

condemnation proceedings. The plaintiffs claimed that the interest should have been allocated in the same manner as the principal and that a contrary result would constitute a taking of their property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

In its decision, the court in *Locasio* first recited the general rule that interest is a creature of statute and is recoverable only by statute or contract. 365 N.E.2d at 951. The court also determined that there was no fiduciary relationship between the plaintiffs and the county treasurer. 365 N.E.2d at 952; compare *Sellers v. Harris County, supra.* Finally, the court held that the interest in issue came within the purview of the statutory requirement that all earnings accruing on any investments by the county treasurer of county monies must be credited and paid into the county treasury. This Court's decision in *MacMillan* was distinguished on the ground that it was based on a construction of "Federal statutes and rules, not on the legal or equitable principals concerning accountability for interest." 365 N.E.2d at 953. See also *Gonzalez v. Danaher,* 30 Ill.App.3d 992, 332 N.E.2d 603 (1975); and *In re Deposit Of Public Moneys,* 52 D. & C. 646, 93 P.L.J. 147 (Pa.Com.Pl. 1945).

Likewise, in this case, the Florida Supreme Court construed Section 28.33, Florida Statutes, and gave effect to the legislative scheme established by that statute for the disposition of interest earned pursuant to its provisions. In this respect, therefore, the Florida Supreme Court's decision here is not inconsistent with the bulk of the judicial decisions cited above. They too recognized that a legislature may rightfully provide for

the disposition of property legislatively created. The fact that the disposition required by Section 28.33 differs from the disposition contemplated by the statutes involved in certain of those decisions does not raise this case to a federal constitutional level or warrant this Court's plenary consideration.

### B. The Question Presented Was Not Timely Or Properly Raised Or Expressly Passed On By The Florida Supreme Court

It has been stated often that this Court will not review a federal question unless the question has been properly presented to the state court below. See, e.g., *Street v. New York,* 394 U.S. 576 (1969); *Cardinale v. Louisiana,* 394 U.S. 437 (1969); and *Shelley v. Kraemer,* 334 U.S. 1 (1948). Mere reference to the "Constitution of the United States" or the "Constitution and laws of the United States" is insufficient. See *Herndon v. Georgia,* 295 U.S. 441, 442-443 (1935); *F. G. Oxley Stave Co. v. Butler County,* 166 U.S. 648 (1897). As stated in *New York Central & H. R. Co. v. New York,* 186 U.S. 269, 273 (1902), "it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

In this case, Appellants did not specifically raise in the state courts below the question as to whether Section 28.33, Florida Statutes, violates Article IV, Section 4 of the United States Constitution. In fact, an examination of the record should reveal that the Appellants never expressly relied on Article IV, Section 4 or that provision's guarantee of a "republican form of government." Moreover, a review of the Florida

Supreme Court's decision below reveals no reference to such a federal claim. See *Street v. New York, supra* at 582, in which it was stated that when the highest state court has failed to pass upon a federal question, "it will be assumed that the omission was due to want of proper presentation." Thus, this Court should not now review the validity of Section 28.33 on the ground that it violates Article IV, Section 4.

However, even assuming that Appellants have properly reserved this federal question, it cannot be seriously maintained that Section 28.33, Florida Statutes, has "destroyed" the judicial branch of the Florida government or "materially curtailed" its power and authority in violation of Article IV, Section 4 of the United States Constitution. See *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223, 243 (1973); and *State v. Lehtola,* 55 Wis.2d 494, 198 N.W.2d 354 (1972). According to the Florida Supreme Court, even the minimal limitation on judicial options that Section 28.33 may pose with respect to the method of handling disputed funds apparently can be judicially overridden. As stated in the opinion below in response to one of Appellants' contentions:

> "It is irrelevant that had these funds been initially held by a receiver, the interest earned would have accrued to the party receiving the principal. In that event, judicial discretion would have been exercised and the legislature, under our separation of powers doctrine, could not effect a change in the court's order. Art. II, §3, Fla. Const. The legislature has the right, however, to decide that [interest on] funds held

by a public officer in a public account accrue to the benefit of all the people." 374 So.2d at 953.

Surely, this language demonstrates that the Florida Supreme Court has construed and applied Section 28.33, Florida Statutes, in a manner that protects the integrity of the state's judicial branch of government against any "curtailment" that Section 28.33 may arguably represent. Also, the fact that the Circuit Court below ultimately did grant the Appellants' motion to pay the interpleader monies involved to the Receiver, with the interest accruing thereafter to flow with the principal, proves that Section 28.33 does not constitute a legislative instrusion into the province of the judiciary. Had the Appellants made such motion initially, instead of moving to pay the interpleader monies into the Circuit Court registry, perhaps the interest in issue would not have been created and this case would have been unnecessary. Cf. *Adams, George, Lee, Schulte & Westinghouse,* 597 F.2d 570 (5th Cir. 1979), in which the unsuccessful claimants of a right to interest could have likewise acted on their own to protect that alleged right, but did not. In any event, however, the Appellants' argument on this point is totally without merit and warrants no further consideration by this Court.

## III.

## CONCLUSION

WHEREFORE, Appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument and that the question sought to be reviewed was not timely or properly reserved or expressly passed on by the Florida Supreme Court, and Appellees respectfully move this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Florida Supreme Court.

Respectfully submitted,

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*Attorneys for Appellees*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of , 1980, copies of the foregoing Motion to Dismiss Or Affirm were furnished by mail to HARVEY M. ALPER, Massey, Alper, Wack & Eaton, 165 Whooping Loop, Altamonte Springs, Florida, 32701, Attorney for Appellants, and to all other persons required to be served in accordance with the Supreme Court Rules.

_____

HARRY A. STEWART

Supreme Court, U.S.
FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1033

WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
*Appellants,*

vs.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
*Appellees.*

AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

## BRIEF FOR THE APPELLANTS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1033

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WEBBS FABULOUS PHARMACIES, INC., AND ECKERD'S OF COLLEGE PARK, INC., *et al.*,
*Appellants,*

VS.

ARTHUR H. BECKWITH, JR., CLERK OF THE CIRCUIT COURT AND SEMINOLE COUNTY, FLORIDA,
*Appellees.*

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AN APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

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## BRIEF FOR THE APPELLANTS

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## OPINION BELOW

This is an appeal from the final order and judgment of the Supreme Court of Florida entered October 4, 1979, denying Appellants' ("Webbs") Motion for Rehearing, and thereby affirming such Supreme Court's decision of May 31, 1979, upholding the Constitutionality of Florida Statute §28.33.

The decision of the Supreme Court of Florida appears at 374 So.2d 951 (1979) as *Arthur H. Beckwith, Jr., Clerk*

*of the Circuit Court, etc., Appellants, vs. Webb's Fabulous Pharmacies, Inc., et al., Appellees.* The decision appears verbatim as Appendix A to this brief and is appended hereto.

## GROUNDS UPON WHICH JURISDICTION IS INVOKED

This case is fundamentally a Constitutional challenge of a lengthy state statute which provides in pertinent part as follows:

> "Monies deposited in the registry of the court shall be deposited in interest-bearing certificates . . . *All interest accruing from monies deposited shall be deemed income of the office of the clerk of the circuit court . . .*" (§28.33 *Official Florida Statutes,* 1977, at page 162, emphasis added.) (The unabridged text of the statute appears verbatim as Appendix B to this brief and is appended hereto.)

Appellant Webbs argues that the appropriation of interest earned on private monies held in the Court Registry constitutes (a) a denial of due process, (b) a taking of property without just compensation, (c) a denial of the law's equal protection and (d) a legislative invasion into the sole realm of the judiciary. In the process of making such arguments, Webbs also asserts the statute is infirm in that it creates a tax upon use of and access to the Courts.

This Court has jurisdiction hereof pursuant to 28 U.S.C.A. §1257(2).

## REFERENCE TO SEPARATE APPENDIX

Citations to the Separate Appendix filed in this Supreme Court in connection herewith appear, for example, as "1a," "2a," "3a," etc.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This appeal involves §28.33 Official Florida Statutes, 1977, the text of which is, as previously indicated, set out verbatim as Appendix B hereto.

Webbs places heavy reliance herein on the United States Constitution, Amendment 5, which provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall any private property be taken for public use, without just compensation."

Webbs also relies upon United States Constitution, Amendment 14. This provision provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved is Article IV, §4 of the United States Constitution which provides in pertinent part:

> "The United States shall guarantee to every State in this Union a Republican Form of Government. . ."

Webbs contends this United States Constitution provision should be read in conjunction with clause one of Article IV, §2 thereof which provides:

> "The Citzens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The record below, taken as a whole, reveals that in addition to the foregoing, the Florida Supreme Court had before it the comparable State Constitutional provisions as embodied in the Constitution of the State of Florida (approved November 5, 1968, effective January 7, 1969, as amended) including:

> "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. . ." Florida Constitution, Article I, §2.

> "No person shall be deprived of life, liberty or property without due process of law . . ." Florida Constitution, Article I, §9.

> "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Florida Constitution, Article I, §21.

> "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch

> shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Florida Constitution, Article II, §3.
>
> "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner. . ." Florida Constitution, Article X, §6(a).

In addition, Appellant Webbs relies upon the common law, having cited to the Florida Supreme Court the Magna Charta (or the Great Charter of King John) granted at Runnymede on June 15, 1215. That ancient document provides:

> "§40. To none will we sell, to none will we deny, or delay, right or justice."

It is this provision of both ancient and common law, taken with others similarly appearing in the Magna Charta and elsewhere, which we have paraphrased into the great underlying principle of American law to the effect that all Courts shall be open to all, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice shall be administered without sale, denial or delay.

## QUESTION PRESENTED

The following question, including every subsidiary question fairly comprised therein, is presented by this appeal:

> Does a state statute, which provides that all interest earned upon funds held in the Registry of Court automatically becomes public money, violate the Fifth and Fourteenth Amendments to the

United States Constitution, as well as Article IV, §4 thereof?

## SYNOPSIS OF THE CASE

This case challenges the Constitutionality of Florida Statute, §28.33 which provides that as to Florida Court Registries "All interest accruing from monies deposited shall be deemed income of the office of the clerk of the circuit court . . ."

The instant controversy arose when, pursuant to the bulk sales provisions of the Uniform Commercial Code, the purchaser (Eckerd's) of the assets of a business (Webbs) paid the purchase price proceeds for the business assets (nearly two million dollars) into the Court Registry (administered by Beckwith) because claims of creditors against Webbs exceeded the price Eckerd's had agreed to pay for the assets.

From the inception of this case, the trial Court specifically reserved judgment on the rightful party(s) entitled to the interest earned on the nearly two million dollar fund. Clerk Beckwith, representing the interests of Seminole County, Florida, in this appeal, has been paid a small percentage of the total fund placed with him (slightly more than one-half percent or somewhat less than $10,000) for holding the fund. This percentage fee, prescribed by §28.24, Official Florida Statutes, 1977 at page 160, is not an issue here. In fact, Webbs maintains this percentage fee is the only charge to which the Clerk is justly entitled.

The trial Court dealt with the Constitutional arguments and found the subject statute Constitutionally infirm. The

Florida Supreme Court reversed. Appeal was timely taken to this Supreme Court.

The position of the Florida Supreme Court is that "There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." *Beckwith,* supra at page 953. See also Appendix A hereto.

Appellant Webbs maintains that the interest earned on the Registry account is private property accruing to the benefit of those ultimately found entitled to the principal sum on deposit. *Branch v. United States,* 100 U.S. 673, 25 L.ed. 759 (1880); *Coudert v. United States,* 175 U.S. 178, 20 Sup.Ct. 56, 44 L.Ed. 122 (1899). Appellant argues that under the circumstances, this use of private property to produce income for public purposes is an unconstitutional appropriation of rights in such private property. *Talcott v. Allahabad Bank, Ltd.,* 444 F.2d 451 (C.A.5th Cir., 1971); *United States v. 15.3 Acres of Land,* 158 F.Supp. 122 (M.D. Pa., 1957).

In simplest terms, Appellant contends that under the foregoing facts, the use of private property (in this case money) to produce income for government constitutes a taking in contravention of law. The situation is exacerbated here because the Courts are utilized as the mechanism to effect the expropriation, which is essentially a tax since it has no relationship to the services rendered in exchange for the charge.

## STATEMENT OF THE CASE

This proceeding commenced as an interpleader action brought pursuant to Chapter 676, Official Florida Statutes, 1977. The real parties in interest here (as Appellants)

are some nearly two hundred creditors of Webbs Fabulous Pharmacies, Inc., a now defunct business. The interests of these creditors are represented here by the Court-appointed Receiver for Webbs assets.

In February, 1976, Eckerd's of College Park, Inc., (Eckerd's), purchased most of the assets of Webbs Fabulous Pharmacies, Inc., (Webbs). The sale was effected during a period of grave financial difficulty for Webbs. Thus, at "closing," Webbs debts appeared to be greater than the purchase price. In fact, Webbs debts proved to exceed the purchase price by many hundreds of thousands of dollars.

Consequently, Eckerd's proceeded to effect the closing pursuant to a portion of the Uniform Commercial Code commonly called the "Bulk Sales Act" (Chapter 676, Official Florida Statutes, 1977). This necessitated (made legally mandatory) that Eckerd's pay the purchase money proceeds into the Circuit Court Registry pursuant to an Interpleader Complaint. Therafter, Webbs creditors would have no choice but to look to the Court and the interpleaded funds for their money. This process of determining which claimants against the fund were entitled to share in it, and if entitled then to what extent, would ultimately take nearly three years.

Eckerd's filed its Complaint for Interpleader on February 27, 1976, asking in part that the "Court enter an order permitting Eckerd to pay into this Court the sum of $1,812,145.77" and requiring creditors "to file their claims with this Court and to interplead and settle between themselves their rights and claims to the monies deposited herein." (R. 4 & 5).

The Circuit (trial) Court entered a "Final Order of Interpleader" on June 15, 1976, (1a-3a), but directed

Eckerd's to hold the funds "IN CUSTODIA LEGIS." The Circuit Court would later order the funds paid into its Registry.

When the latter action was taken on July 12, 1976, the Circuit Court had apparently already learned that the Clerk of Court (Beckwith) and through him Seminole County, Florida's general revenue fund (Seminole), claimed entitlement to all income earned upon monies placed in the Court Registry *in addition* to a statutory fee of one (1%) percent on the first $500.00 and one-half (1/2%) percent of the balance of all funds so placed with the Clerk. These statutory one percent and one-half percent charges, collected pursuant to §28.24, Official Florida Statutes, supra, are not at issue here. Appellants do contend, however, that the very existence of these fees, and the fact that they were collected in this case, does enhance Appellants' arguments.

Ultimately, when the Circuit Court ordered the funds paid into its Registry, it then and there declared:

> ". . . The Court reserves ruling over the issue of whether the interest earned on the fund invested by the Clerk . . . shall accrue to the benefit of the creditors of Webb's Fabulous Pharmacies, and the transfer to and investment by the Clerk. . . shall be wholly without prejudice to the claim of the creditors to the earnings from the invested funds and the Clerk of the Circuit Court shall not, by reason of the receipt of said funds or the earnings thereon have any greater claim thereto than before such receipt." (4a-5a).

The very next day following the entry of this Order the funds were deposited with Clerk Beckwith. (6a).

The issue of entitlement to the accruing and compounding interest apparently continued to simmer. Despite the need to resolve matters more germaine to the case (matters which ultimately consumed most of the twenty-four Circuit Court files in this cause), the controversy with the Clerk was not forgotten. Eventually, largely in response to the insistence of Beckwith and Seminole that the county was utlimately entitled to all interest earned on the interpleaded moneys, the Circuit Court "(u)pon the Court's own motion and in exercise of the Court's inherent power and jurisdiction" appointed a Receiver to hold and invest the interpleader fund "on behalf of the creditors," thereby insuring that all interest thereafter accruing would inure to the benefit of the creditors. (7a-10a).

Subsequently the Receiver took custody of the interpleader fund previously held by Beckwith, exclusive of the interest thereon which Beckwith continued to hold. As to such arrangement, the Circuit Court specifically declared:

> "The Court reserves ruling upon the rightful party entitled to the accrued interest earned upon the interpleader funds and therefore directs the Clerk to hold such sums in the Registry of the Court, in interest bearing accounts or certificates, until the Court makes a determination as to the same." (14a).

On August 26, 1977, the Circuit Court in response to the Receiver's Motion for Assistance and Instructions (16a-19a), advised that the "Receiver shall institute and the Court will consider entertaining a Motion in the present proceeding for an Order directing the Clerk of this Court to remit to the Receiver the sum of approximately Ninety One Thousand ($91,000.00) Dollars which sum constitutes

all interest earned upon the interpleader fund while the same remained in the Clerk of this Court's custody." (21a). The Circuit Court went on to note that the Clerk asserted his right in these funds pursuant to Florida Statute, §28.33.

The Receiver then filed a "Motion for Direction to Clerk to Remit Certain Monies to Receiver." He asserted in the motion that the subject moneys were not "public monies" by operation of Florida Statute, §28.33. (22a-24a). This motion was subsequently withdrawn before it was argued; in withdrawing the motion the Receiver advised the Court he anticipated "a lengthier speaking motion on the same subject matter, wherein constitutional issues will be raised with specificity, will be filed with the Court in the near future." (25a). The lengthier speaking motion did, in fact, follow. (26a-32a). It raised a series of Constitutional and other problems with the Clerk's retention of interest accrued upon the interpleader moneys including, but not limited to, the following:

(a) the statute, as interpreted by the Clerk, effected a "taking of private property without due process of law";

(b) the statute, as interpreted by the Clerk, constituted "an invasion of the realm of the Judiciary by the Legislature";

(c) the statute, as relied upon and interpreted by the Clerk, was unconstitutionally vague; and,

(d) the statute, as applied by the Clerk, deprived citizens of equal protection under law.

The argument that the statute took property without just compensation was a common thread running both im-

plicitly and explicitly through all of the foregoing. Additionally, in a supplementary pleading filed before the then pending motion was considered by the Court, the Receiver added another Constitutional ground to his challenge:

> (e) the retention of the interest earned on the receivership fund constituted an illegal and unconstitutional tax wherein the Court was compelled to act as a tax-producing agency. (33a-34a).

Having raised these arguments in his motion and supplement the Receiver thereafter filed a detailed memorandum of law. In this memorandum he argued these and various other Constitutional issues at length to the trial Court. (R. 72-R. 100). The Receiver pointedly maintained in his memorandum that the retention of interest by the Clerk offended due process, constituted a tax upon access to the Courts, was clearly a taking of property without just compensation, violated the separation of powers doctrine and was fatally vague.

The Clerk responded to these arguments in his trial Court level memorandum. (R. 112-R. 122). The Receiver in turn responded to the Clerk's memorandum in a Receiver's reply memorandum. (R. 123-R. 132). Presumably all this served to elucidate the Constitutional issues before the trial Court which also heard oral argument from the parties.

In response to the memoranda and arguments, the Circuit Court declared on July 24, 1978, that it was:

> "Ordered and Adjudged that the Clerk of this Court is not entitled to any interest earned, accrued or received on monies deposited in the registry of this Court . . . the creditors herein are

> the rightful parties entitled to all such interest earned on the interpleader fund while it is held by the Clerk of this Court." (34a-35a).

This Order was subsequently both amended and supplemented after the Receiver moved for a "Nunc Pro Tunc Order" on the grounds that he had "asserted that Florida Statute, §28.33 is unconstitutional for a number of reasons, including that it directs the taking of private property without due process of law, that it violates the constitutional separation of powers between the legislative and judicial branches, and that it provides for an unconstitutional tax." (36a-39a). In response the trial Court amended its Order of July 24, 1978, on August 23, 1978, to provide "nunc pro tunc":

> "Ordered and Adjudged that Florida Statute, §28.33 and Laws of Florida, Chapter 73-282, are unconstitutional to the extent that the provisions thereof pertain to private monies held in the registry of the court in pending litigation and specifically to those monies held in the registry of the Court in this case." (40a-41a).

Chapter 73-282, Laws of Florida, is essentially the same as §28.33, Official Florida Statutes, 1977.

There followed an appeal directly to the Supreme Court of the State of Florida. The State Supreme Court reversed the trial judge, declining to explain its reasoning, except in the most general terms, despite extensive briefing and argument before it raising the same issues argued both here and at the trial level. Thus the Supreme Court of Florida observed:

> "We begin our analysis by reviewing rules of law so well established as not to require citation. . ."

> "Inherent in the trial judge's ruling is a finding that interest earned is the private property of the person ultimately receiving the principal. This proposition rests on the underlying premise that the principal remains private when deposited in the clerk's registry. Neither the premise nor the conclusion withstands close analysis . . ."
>
> "There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." (See *Beckwith,* supra at 952 and 953, and Appendix A hereto.)

One Florida Supreme Court Justice dissented in part from this reasoning with an opinion.

A timely direct appeal was taken to this Supreme Court on December 31, 1979. Probable jurisdiction was noted here on March 17, 1980. A single appendix has been designated and is being filed with this Court. This brief is filed timely.

## SUMMARY OF ARGUMENT

Appellant argues the appropriation of interest earned on private monies held in the Court Registry is a denial of due process, a taking without just compensation violative of equal protection precepts and an act legislatively mandated in violation of the separation of powers doctrine. Appellant also asserts the statute creates an inherently unconstitutional tax upon use of and access to the Courts.

Citing *Himely v. Rose,* 5 Cranch 313, 3 L.ed. 111 (1809), Appellant begins its argument with the proposition that "In equity, interest goes with the principal as the fruit with the tree." Appellant continues by citing ample Federal

precedents to the effect that fees and emoluments collected by a Clerk of Court and deposited at interest are not public moneys. *Coudert v. United States,* 175 U.S. 178, 20 Sup. Ct.56, 44 L.ed.122 (1899); *Branch v. United States,* 100 U.S. 673, 25 L.ed. 759 (1880).

Appellant also urges that the Federal Courts presently follow the rule Appellant sought to make incumbant in Florida but which the Florida Supreme Court rejected. The rule provides that private moneys do not change in character to public funds upon their deposit in Court. *Talcott v. Allahabad Bank, Ltd.,* 444 F.2d 451 (C.A. 5th Cir., 1971).

Contending that the expropriation of all interest by government from the Court Registry, which the Clerk here seeks to effect, is a tax upon use of and access to the Courts, Appellant argues that this Court should strike the tax as a clog upon the judicial system. *Life & Casualty Insurance Co. v. McCray,* 291 U.S. 566, 54 Sup.Ct. 482, 78 L.ed.987 (1934). Further, it is argued that such an exaction is an abrogation of the rights of citizens of the United States since it puts a tax upon use of and access to the Courts. Such use and access is an implicit right of citizenship and while under the law of Florida a small fee for the use of the Court Registry may validly be imposed, Appellant maintains retention of all interest earned on private moneys can only be deemed a tax because the exaction is a forced contribution to meet the public needs of government and is not a charge reasonably related to the cost of services rendered in return. The fact that the Clerk in Florida receives a small fee in addition to all the interest makes the situation even more grievous.

These actions offend not only our Federal Constitution but the common law and the Magna Charta. Further,

it is for this Court to determine if the tax as here applied affects Constitutional rights. *Storaasli v. State of Minnesota,* 283 U.S. 57, 51 Sup.Ct. 354, 75 L.ed. 839 (1931).

Then, while conceding that because this next argument is novel it is precedentially weak, Appellant suggests that by making the Courts tax collectors and in compelling them to utilize their Registries in legislatively mandated fashions, the Florida Legislature has offended Article IV, §4 of the United States Constitution. This is so, says Appellant, because the separation of powers doctrine is mandated by the Federal Constitution and guaranteed to the states and their citizens by the national government. *VanSickle v. Shanahan,* 511 P.2d 233 (Sup. Ct. Kan., 1973).

Appellant concludes that significant Federal questions are raised in this proceeding. Urging that the states have almost unanimously concluded that to permit interest on Registry funds to accrue to the account of government is wrong, Appellant states that such a result is "untenable so long as private property is constitutionally protected." *Sellers v. Harris County,* 483 S.W.2d 242 at 243 (Sup.Ct. Tex., 1972). To like effect, Appellant says are many other decisions including, for example, *McMillan v. Robeson County,* 137 S.E.2d 105 (Sup.Ct. N.C., 1964). Appellant sums up in these words:

> "The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision. . . that no person shall be deprived of his property 'by law of the land,' applies to the earnings in the same manner and with the same force as it applies to principal." *McMillan,* supra at 108.

## ARGUMENT

**Introduction:**

The Florida Supreme Court began its decision in this cause by alluding to but not defining what it said were "rules of law so well established as not to require citation." *Beckwith,* supra at 952; see also Appendix A hereto. The State Supreme Court rested its decision in the action at hand on the legal king-pin that private moneys deposited in a Court Registry became public moneys immediately upon their deposit into Court.

In the Florida Supreme Court's own words, "these funds are considered 'public money' from the time they are deposited in the general registry of the court to the time they leave the account." Therefore, logic dictates that argument in this brief proceed initially with a head-on analysis of this decision of the Florida Supreme Court which appears at 374 So.2d 951 and as Appendix A hereto. That decision can be shown to be so poorly reasoned and so unreasonable as not to pass either general legal or logical muster, let alone Constitutional scrutiny. Once convinced of the first two of these three problems, the Supreme Court of the United States may more readily proceed to determine if a decision contrary to that of the State High Court must be reached as a matter of Constitutional law and simple logic.

Certainly, when this Court fully considers the issue now before it, this Supreme Court will be compelled to find that the use of private money, paid into a state Court Registry, to produce general revenue for government, is a taking of private property in contravention of basic Constitutional precepts "so well established as not to require citation." Stated another way, a state statute which pro-

vides that all interest earned upon private funds temporarily held in Registry of Court becomes county (public) money, violates the Constitutional rights of citizens of the United States.

We therefore begin by examining the Florida Supreme Court's dual premise and conclusion that, by operation of statute, moneys paid into the Registry of Florida Courts instantaneously change in character from private to public funds upon their delivery into safekeeping. Our anlaysis proceeds with the caveat that in this case the trial Court knew of this theory from the start and declined to accept the funds without *first* specifically reserving jurisdiction on the point – so as not to prejudice the rights of the private litigants represented here as "Webbs." (4a-5a).

**The Federal View:**

The controlling principal in this case is startling in its simplicity. It was stated long ago by a Justice of this Court in hardly more than a dozen words:

> "In equity, interest goes with the principal as the fruit with the tree." Justice Johnson in *Himely v. Rose,* 5 Cranch 313, 3 L.ed. 111 (1809).

Questions very similar to the one presented on this appeal have previously been answered by this Court. Those answers lend credence to Appellant Webbs' position.

In *Coudert v. United States,* 175 U.S. 178, 20 Sup.Ct. 56, 44 L.ed. 122 (1899), this Court was faced with a claim against the Federal Government for loss of private moneys deposited by a marshall in a national bank which was a designated depository of public money. The moneys deposited represented the proceeds of the sale of a vessel seized and sold during the Civil War as a blockade runner.

The owner of the vessel, (actually his estate, the vessel's owner being long deceased) was subsequently determined entitled to the proceeds of the sale. Unfortunately for the estate, the bank wherein the money was being held by order of Court failed before the estate could be justly compensated by means of payment of such moneys to it. Thus arose the issue of whether or not the funds so held and deposited were "public moneys" within the meaning of applicable statutes. Had the moneys been "public" while they were being so held, the government would have been liable for their loss. The claimant asserted that the funds were virtually in the Treasury of the United States and were subject, as public moneys are subject, to the use of the United States and that therefore a debtor/creditor relationship existed between the ultimate private owner(s) of the fund and the United States. This Court did not agree:

> "By the seizure of the [vessel] Teresita the title to her did not change nor did the title to the proceeds of her sale, *pendente lite.* That awaited adjudication, and whatever relations to such proceeds or responsibility for them the United States might have assumed if they had been deposited with an assistant treasurer, they did not become public money and subject to the statutes applicable to public money, and authorized to be deposited in a public depository." *Coudert,* supra at 183, emphasis supplied.

To like effect is an earlier case styled *Branch v. United States,* 100 U.S. 673, 25 L.ed. 759 (1880). In *Branch* certain cotton was seized under the (wartime) confiscation act. The cotton was sold during the progress of a suit for its condemnation. By order of the Court, the proceeds were deposited by the Clerk to await the further order of

the Court in the First National Bank of Selma, Alabama. This was done upon a notification of the Secretary of the Interior that such bank had been designated by the Secretary of the Treasury as a depository of public money. Pending the suit the bank failed. In the proceedings for winding up its affairs a dividend upon the deposit was paid to the Court, and then by order paid over to the claimants. A suit was brought against the United States for the balance of the original deposit upon the ground that the Selma bank was at the time of the deposit a designated depositary of public money and was part of the Treasury of the United States, and that consequently a deposit in it was a payment into the Treasury of the United States, binding the latter to its return. The proceedings here were disposed of in an opinion by Mr. Justice Waite. He said:

> "The position assumed by the appellants is to our minds wholly untenable. The designated depositaries are intended as places for the deposit of the public moneys of the United States; that is to say, moneys belonging to the United States. No officer of the United States can charge the government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depositary. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depositary, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the

> benefit of whomsoever in the end it should be found to belong." *Branch,* supra at 674.

For further commentary to like effect see *United States v. McMillan,* 253 U.S. 195, 40 Sup.Ct. 540, 64 L.ed. 857 (1920); *United States v. Mason,* 218 U.S. 517, 31 Sup.Ct. 28, 54 L.ed. 1133 (1910).

In this connection it is of more than passing interest to note several aspects of Florida law; the similarity of these aspects of State law to their Federal counterparts makes the Supreme Court of Florida's decision in this cause ever more suspect.

First, the Clerk in Florida has no personal liability for loss of the principal sum held by him. It is the law of Florida that, as a general rule, the payment of money into Court passes the title to the money so paid irrevocably to the party for whom it is tendered. *Masser, et al. v. London Operating Co.,* 145 So. 72 (Sup.Ct. Fla., 1932). Thus, the Supreme Court of Florida has held that should there be any loss once the money or property is tendered to and deposited in the Court Registry (as, for example, specifically in case of bank failure), the loss must fall on the litigant(s) to whom title passes or for whose benefit the payment was tendered. The Florida State Court Clerk, like his Federal counterpart, has no liability for loss of the fund. This holding was made specifically in a Florida case where Court Registry moneys were lost when the bank in which they were placed collapsed. In that case it was stated:

> "The rule is well settled that, when a party litigant, pursuant to court order, pays into the registry of the court as an unconditional tender a sum of money which he contends is due by him

> to his adversary litigant in a cause pending between them, the title to the sum passes irrevocably to the adversary though he does not accept it until the conclusion of the litigation or at some other time. If subsequent to payment into court or recognition by the court the sum is lost or stolen, the loss must fall on the litigant to whom title passes or for whose benefit it was tendered. The tender in other words becomes a fund in custodia legis subject to the order of the court or the pleasure of the depositee." *Phipps et al. v. Watson,* 147 So. 234 at 235 (Sup. Ct. Fla., 1933) citing extensive authorities.

For further Florida authority to like effect see also *Mordt v. Robinson,* 156 So. 535 (Sup.Ct. Fla., 1934).

Second, the very statute here challenged limits the Florida Clerk's liability. It provides in part that "No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations." §28.33, Official Florida Statutes, 1977.

Third, there are ample mechanisms under Florida Law to absolve the Clerk from any residual or arguable liability which he might possibly have. See Chapter 136, §69.031, etc., Official Florida Statutes, 1977.

These similarities to the Federal law bear consideration. They are helpful in reading the Federal cases where the law seems clear and where there is overwhelming authority in support of Appellant Webbs' arguments.

The United States Court of Appeals for the Fifth Circuit recently faced an analogous fact situation to the one

presented here. In *Murphy v. Travelers Insurance Company,* 534 F.2d 1155 (1976) that Court handled an action by a widow, as named insured, against a life insurer, where the insurer filed a claim of interpleader. While dealing with numerous other issues in *Murphy,* the Court applied and approved of the (leading) Texas rule governing the accrual of interest in interpleader matters. The Court stated that "Once a stakeholder makes an unconditional offer to give up possession of a disputed fund, it ceases to exert that dominion over the money sufficient to justify an obligation to pay interest thereon, and the rule is that once such unconditional tender is made any liability for interest [paid by the stakeholder] ceases as of the date of tender." *Murphy,* supra at 1165. Interest earned on the fund after the tender is made goes with the principal. This is so because the Fifth Circuit also remarked in *Murphy* that following the deposit of funds into the Court Registry they became the property of the claimant ultimately determined to be entitled thereto.

Even more helpful to Webb's position here is *Talcott v. Allahabad Bank, Ltd.,* another Fifth Circuit Court of Appeals case appearing at 444 F.2d 451 (1971). This case, too, was an interpleader action. It was first heard at trial before the United States District Court sitting at Savannah, Georgia. In *Talcott,* Judge Thornberry, speaking for the Fifth Circuit, addressed the question of interest on the interpleader fund with specificity. He noted that the trial Court had ordered the Clerk of the Court to pay out to the victorious claimants all the funds deposited in the Registry of the Court including the interest that had been earned on the fund. While a party to the proceeding opposed the award of such interest, Judge Thornberry remarked simply that "We see no merit whatever to . . . argument on this point. There is no reason why interest accruing on a con-

tested fund during litigation over the fund should not be awarded to the winner of the fund." *Talcott,* at 463.

To like effect are cases from other circuits. Thus, it is remarked in *Brooks & Woodington, Inc.,* an appeal in a bankruptcy proceeding:

> "There has been an informal indication that the assets here involved have been invested in interest-bearing securities or an interest-bearing account pending the outcome of this appeal. If this is indeed the fact, we recognize the existence of some equities for the allowance of interest. In general, where a fund in litigation is deposited in court, interest may be recoverable to the extent that the fund earns interest during such time. 47 C.J.S. Interest §54." *Brooks & Woodington, Inc.,* 505 F.2d 794 at 799 (C.A. 7th Cir., 1974).

Similarly, the various Federal Courts of Appeals have repeatedly held that the payment of money into the Court Registry does not deprive litigants of their ownership rights therein. Rather, the Courts are said to hold the moneys merely as trustees for the rightful owners. *Baxter v. United Forest Products, Co., Inc.,* 406 F.2d 1120 (C.A. 8th Cir., 1969).

It is proper that such moneys be placed in an interest bearing account where they may earn interest at the highest current rate; this is in accord with normal practice, especially where the parties have agreed to such action. Interest accrues to the victorious claimant(s). *Prudential Insurance Company of America v. King,* 308 F.Supp. 1143 (W.D., Mo., 1969).

The conclusion that the funds remain private when deposited with the Clerk, uniformly reached by the Fed-

eral Courts, is of course at variance with the conclusion of the Florida Supreme Court below that the principal sum becomes public property while deposited with the Clerk and that "these funds are considered 'public money' from the time they are deposited in the general registry of the court to the time they leave the account." See *Beckwith,* supra, at 952 and Appendix A hereto.

Again and again the Federal Courts have said such moneys are property not of any government but of the claimant. See *United States v. Dunnington,* 146 U.S. 338, 13 Sup.Ct. 79, 36 L.ed 996 (1892); *Chatham & Phenix Nat. Bank of City of New York, v. Guaranty Trust Co. of New York/Kingdom of Roumania v. Same,* 256 F.90 (C.A. 2nd Cir., 1919); *In Re Moneys Deposited, etc.,* 243 F.2d 443 (C.A. 3rd Cir., 1957); *United States v. 15.3 Acres of Land,* 158 F.Supp. 122 (M.D., Pa., 1957); *Federal Home Loan Bank v. Long Beach Fed. S & L Assn.,* 122 F.Supp. 401 (S.D. Ca., 1954). Cf. *United States v. MacMillan,* 253 U.S. 195, 40 Sup.Ct. 540, 64 L.ed. 857 (1920); *United States v. Mason,* 218 U.S. 517, 31 Sup.Ct. 28, 54 L.ed. 1133 (1910).

Finally, it seems appropriate to consider the operative rules of court. The Federal Rules of Civil Procedure governing Registry deposits are essentially identical to their Florida counterparts. (See F.R. Civ. P. 67; Fla. R.Civ.P., 1.600). In fact, the "committee notes" to the Florida Rule observe that it (the Florida Rule) "is Federal Rule 67 and provides for deposits in court." In other words, Florida appropriated the Federal Rule as its own, word for word. The Florida Rule, like its Federal counterpart, provides that "Money paid into court under this rule shall be deposited and withdrawn by order of court." In so doing the committee notes say the rule "merely declares the law of Florida set out in *Phipps, et al. v. Watson,* 147

So.234, as that case relates to procedure." See West's Florida Statutes Annotated, Rules, Vol. 31, for full text of both the Florida Rule and Committee Note at page 262 (1967). As to the Federal (companion) rule, this Court long ago observed:

> "The question of the liability of the clerk to pay interest to litigants on money deposited by them is in a large degree, covered by the rules of court . . . which permit . . . an application of a litigant to the court to direct the allowance of such interest and to provide for its payment by the clerk when the request is granted." *U.S. v. MacMillan,* supra at 205.

Thus, this Court has previously recognized authority over judicial Registries as part of inherent (equitable) judicial powers. The same can fairly be said to be the case in Florida, the Federal and Florida Rules being essentially identical for purposes of this case.

Consequently, the issue remaining before this Supreme Court seems further reduced in scope. It comes down to one of whether or not the principle followed at the Federal level, where the underlying law is essentially the same as state law in Florida, is a principle based in a Constitutional imperative or some other source. If it is Constitutionally imperative that interest earned on registry moneys must be paid to victorious litigants rather than government authority, the decision of the Florida Supreme Court below must fall.

Somewhat surprisingly, the reason behind the rule followed at the Federal level, which Appellant Webbs seeks to make mandatory upon the State of Florida, is explained best in numerous and diverse state court decisions and not in the Federal cases.

**The Majority State View:**

The vast majority of states which have judicially considered the issue now at hand have concluded that it is constitutionally imperative that interest earned on Court Registry funds ultimately accrue to the owner of the principal sum – and not to some account of government.

Thus, Appellant Webbs has maintained throughout the course of this litigation that the fatal flaw in Clerk Beckwith's position, even as adopted by the Florida Supreme Court, is that it totally fails to come to grips with the indisputable legal proposition that interest earned on a fund deposited to abide the result of litigation is merely a natural increment to the principal fund, becomes a part thereof and belongs to the litigant ultimately determined to be the owner of the principal. Webbs steadfastly maintains that this is a simple basic property right guaranteed to citizens of the United States. 5th and 14th Amendments, United States Constitution.

The foregoing proposition was recognized, acknowledged and endorsed in the leading American case on this point, *Sellers v. Harris County,* 483 S.W. 2d 242 (Sup.Ct., Tex., 1972). That state court decision was, in turn, viewed with approval in *Murphy v. Travelers Insurance Company,* the Fifth Circuit case already discussed. *Sellers* was briefed and argued at length to the Supreme Court of Florida.

In *Sellers v. Harris County,* supra, the Supreme Court of Texas was confronted with a fact situation very much like the one here. North American Insurance Company there interpleaded a One Million ($1,000,000.00) Dollar life insurance policy (half as much as is involved in the case at Bar), and paid the same into the Registry of the Court, because the proper beneficiary of such fund was in

dispute. The sizeable principal brought a return of some Six Thousand ($6,000.00) Dollars per month since the trial Judge directed the handling of the money in a manner to assure that the victor would receive interest. At the conclusion of the litigation the trial Judge was to determine a reasonable fee for the County (Court Clerk) as compensation for accounting and administration expenses incurred in handling the fund. [Unlike Florida, the Texas County (Court Clerk) was not also entitled to a statutory "service charge" for "services rendered" such as the one of $9,228.74 paid the Clerk in this case (R. 44-46) without argument pursuant to §28.24 (14), Official Florida Statutes, 1977)].

In the Texas case, as in this case, the County (Court Clerk) claimed express statutory authority to retain the interest. The Texas Court described this claim as follows:

> "The contention by Harris County that it is entitled to all of the interest is based on the terms of Articles 1656a and 2558a, Vernon's Ann. Civ. Stats. Article 1656a is a general direction to the county auditor as to the accounting system and the handling of money collected by officers of the county. Such money is to be deposited in the county depository to draw interest for the benefit of the county. Article 2558a is a comprehensive statute setting procedure and liability in the handling of trust funds in the possession of county and district clerks. It makes the county liable if funds on deposit with its designated depository are lost. The clerk is relieved of responsibility for the safekeeping of the funds so long as they are deposited in the legally selected depository. Sections 4a and 4b of Article 2558a direct the commissioners court of the county to receive the in-

> terest earned on the trust fund and to place that interest in the general fund of the county as an offset to the expenses of handling such trust funds for the benefit of litigants." *Sellers,* supra, at 243.

The Texas Court refused to accept Harris County's argument and noted that "these funds are not owned by the county but are only held in trust for the litigant who establishes his right thereto . . . The interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and to its owners." *Sellers,* at 243.

Noting that under the Texas statute (as is presently the case under the challenged Florida Statute) all interest is taken from its owner and given to the county without any consideration to the benefit to the owner or the expense to the county, the Court observed that "if the litigation lasts as long as some lawsuits do, the county will profit enormously. The result is untenable so long as private property is constitutionally protected." *Sellers,* at 243.

Consequently, the Court struck down the Texas statute which, like Florida's, was not reasonably related to the value of the county's services in safeguarding and investing the principal. It was therefore deemed offensive to the due process and other clauses of both State and Federal Constitutions. In so doing the Texas Court spoke not only to the State Constitution and case law, but looked to the Federal Constitution and a decision of this United States Supreme Court as well when it commented:

> "By depriving the owner of a sum not reasonably related to the value of the county's services in safeguarding and investing the principal, the statute offends Article 1, Section 19 of the Texas

> Constitution, Vernon's Ann.St. as well as the Fourteenth Amendment of the United States Constitution. *Myles Salt Co. v. Board of Commissioners,* 239 U.S. 478, 36 S.Ct. 204, 60 L.ed. 392 (1916)." *Sellers,* supra at 244.

Another leading state case in this area which squarely addresses the Constitutional issues raised on this appeal is *McMillan v. Robeson County,* 137 S.E.2d 105 (Sup.Ct. N.C., 1964). In *McMillan* the Supreme Court of North Carolina dealt with a statute requiring state court clerks to account for and to pay over to the general county fund income received on private moneys held by such clerks under color of office. Citing ample authorities, including decisions of this Supreme Court, the North Carolina Court pointedly observed:

> "The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision . . . that no person shall be deprived of his property 'by law of the land,' applies to the earnings in the same manner, and with the same force, it applies to principal."
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> " 'The law of the land' and 'due process of law' provisions of the North Carolina and U.S. Constitution require notice and an opportunity to be heard before a citzien may be deprived of his property." *McMillan,* supra, at 108.

Perhaps one of the most persuasive opinions in the area comes out of Nebraska where under the facts of the case which was at Bar, the liability of the officer who was entrusted with the funds was that of an insurer. This strict liability theory is discussed elsewhere in this brief. It does not exist under Florida law, thereby making the Nebraska

theory even stronger under the facts of the Florida case now before this Court. (See *Masser v. London Operating Co.* and *Mordt v. Robinson,* supra, for the proposition that in Florida the Clerk is without liability for loss of Registry funds.) In any event, the Nebraska Court acknowledged the strict liability of the officer for loss of moneys received by him. The Court noted that there are jurisdictions wherein the courts hold that if the officer is strictly liable for the money received by him he thereby becomes, in effect, the owner thereof and as the owner is entitled to keep any interest earned thereon. The Nebraska Court, however, rejected the view that in such circumstances the officer is entitled to the interest. Stating that the true test is not whether the officer is liable to account, but whether the officer is the owner of the funds placed in his hands, the Court said:

> " 'Once settled clearly and definitely whose money the principal sum was, the interest necessarily belongs to that person as an increment to the principal fund, and to argue to the contrary is simply to lose one's self in a metaphysical fog of sophistry failing to give effect to the central principle of right and justice, making the interest the property of the party who owned the principal sum.' " *Bordy v. Smith et al.,* 34 N.W.2d 331 at 334 (Sup.Ct. Neb., 1948) citing *State v. McFetridge,* 54 N.W. 1 at 11 (Sup.Ct. Wisc., 1893).

The proposition that a public officer having custody of private funds cannot keep as income of his office the earnings thereon enjoys judicial precedent of long standing. It may properly be stressed this is particularly true where, as in Florida, the Clerk has no personal liability for loss of the principal sum, provided he places the funds in com-

pliance with applicable law. See *Simons v. City of Jackson,* 63 Tex. 428 (Sup.Ct. Tex., 1885); *Lawson v. Baker,* 220 S.W. 260 (Ct. Civ. App. Tex., 1920, error ref'd.); *McFetridge,* supra; *Pomona City District v. Payne,* 50 P.2d 822 (C.A. Calif., 1925); 26A CJS 484, Deposits in Court, §9; and 5 ALR 2d 250 and cases cited therein. These cases and authorities make it clear that there is a series of long perceived Constitutional problems, all discussed herein, with government retaining all interest earned on moneys held for private parties pending the outcome of litigation. Basically these problems relate to the denial of property rights without affording just compensation and due process of law. That such conclusions are reached seems only natural because in an ultimate sense it is the natural right to be secure in one's property which is at issue here. As to such right, ownership of interest relates back naturally to the time of the initial deposit of the fund into Court. Cf. *Ostly v. Saper,* 305 P.2d 946 (2d DCA Cal., 1957); also *Metropolitan Water District v. Adams,* 197 P.2d 543 (Sup.Ct. Cal., 1948).

Furthermore, at common law and as a matter of policy, it must be said that the trial Court was in the exercise of its inherent Constitutional equity jurisdiction, as recognized by numerous prior judicial decisions, when it attempted to exercise its discretion to direct the handling of funds on deposit in the Court, including their investment at interest, in such way as to best serve the interests of justice, the Court and the litigants. To allow the interpleader deposit, in this case almost Two Million ($2,000,000.00) Dollars, to languish in an iron safe, or otherwise, without drawing interest for the concerned litigants during the pendency of this cause would be unconscionable. Yet that in effect is what the Clerk would do – for he would ultimately pay the creditors of Webbs even less than was paid into the

Court's Registry for their benefit; keeping for his office and account all interest and a portion of principal, to boot, as a so-called fee. This is shocking. Equally shocking is any other rationale by which the County would be able to appropriate the interest that has and will be earned on the fund during the pendency of this cause. See *McLennan County v. North American National Insurance Co.,* 457 S.W.2d 597 (Ct. Civ. App., Tex., 1970, error ref'd n.r.e.).

It seems only of passing interest then that even in Florida the Clerk is not entitled to a fee on sums paid from the Court Registry to meet a condemnation award. *Sarasota v. Burch,* 192 So.2d 9 (2d D.C.A. Fla., 1966). But this takes on special significance when consideration is given to the lucid opinion of the Supreme Court of South Carolina in a condemnation proceeding analogous to *Sarasota v. Burch,* supra. In *University of South Carolina v. Elliott,* 149 S.E.2d 433 (Sup.Ct. S.C., 1966) the University of South Carolina, upon institution of condemnation proceedings, deposited a sum of money in the Registry of the Court as required by South Carolina law. The condemnation proceedings was thereafter concluded between the condemnor and condemnee, whereby the University of South Carolina was to withdraw the deposit that it had made in the Registry. During the pendency of that litigation, the Clerk of the Court had deposited money at interest and the county thereafter claimed ownership of the interest by reason of a South Carolina statute which provided that all state, county and municipal officers depositing funds at interest shall account to the state, county or municipality, as the case may be, for all such interest collected on the deposits. The Supreme Court of South Carolina held, first, that the general rule is that the interest on funds held in custody pending litigation is

simply an increment to the principal and belongs to the person subsequently declared to be the owner of the principal; second, that a fiduciary should not be allowed to make a profit from funds he holds simply as a custodian. The Court concluded that the Clerk was simply a lawful custodian of the funds and therefore had no right to the interest earned thereon and that the interest should be repaid to the owner of the principal at the conclusion of the litigation. The Court furthermore recognized what is now most significant at this appellate level – that the statutory construction urged by the county would deprive the University of its property without compensation and therefore would run afoul of the Constitutional prohibition against such appropriations. In this connection it is noteworthy that the South Carolina case involved two units of government and no private parties. Nonetheless, the Court acted to protect property rights even of a governmental unit. For further state authorities to like effect see *Southern Oregon Co. v. Gage,* 197 P.276 (Sup.Ct. Or., 1921) where it was expressly declared, in an interpleader action, that where the county placed Court Registry funds in a bank to accrue interest during pending litigation, all such interest on such money belonged to the ultimate owner of the fund and not the County; also see *Potter v. County of Wayne,* 207 N.W.2d 448 (Ct. App. Mich., 1973) where it is said in the dissent "there is no provision of law – statutory or common – authorizing confiscation of interest earned . . ." *Potter,* supra at 457. Further authority for Webbs' position can also be found in *Kierman v. Cleland,* 273 P. 938 (Sup.Ct. Idaho, 1929); *Board of Law Library Trustees of Los Angeles County v. Lowery,* 154 P.2d 719 (Ct. of App. Cal., 1945) and *Drainage Dist. No. 2 of Ada Cty. v. Ada Cty.,* 226 P. 290 (Sup.Ct. Idaho, 1924).

While it must be conceded limited case law to the contrary can be found in some American jurisdictions [Cf. *Locasio v. Rosewell,* 365 N.E.2d 949 (1st Ill. Ct. App., 1977)], those few cases are for the most part predicated upon the strict liability of the Clerk or other officer holding the funds in the event of their loss. In other words, these jurisdictions follow a rule stating that if the funds are lost before delivery to the party ultimately found entitled thereto, the loss rests on the government official holding the funds at the time of their loss. Furthermore, such cases are generally silent as to any and all Constitutional considerations. Other cases which fail to follow the majority rule are also often from the lower courts. Cf. *In re Deposit of Public Moneys,* 52 D & C 646, 93 P.L.J. 147 (Pa. Com. Pl., 1945).

The opinions of the highest state courts hereinbefore discussed are important to the proper consideration of this case. They indicate that there is a substantial Constitutional issue here. They are part of the ample line of cases holding statutes like the one here challenged to be Constitutionally infirm. They show the issue here to be well within the ambit of this Court. *United States v. Morgan,* 307 U.S. 183, 59 Sup.Ct. 795, 83 L.ed. 1211 (1939); *United States v. MacMillan,* 253 U.S. 195, 40 Sup.Ct. 540, 64 L.ed. 857 (1920); *United States v. Mason,* 218 U.S. 517, 31 Sup.Ct. 28, 54 L.ed. 1133 (1910); *Florida v. Anderson,* 91 U.S. 683, 23 L.ed. 458 (1876). Since a rule of reason is ultimately the basic law of our land, it is for this Supreme Court to determine whether an asserted right guaranteed to all citizens of these United States is denied by the laws of any state. *Angel v. Bullington,* 330 U.S. 183, 67 Sup.Ct. 657, 91 L.ed. 832 (1946); *Pollock v. Williams,* 322 U.S. 4, 64 Sup.Ct. 792, 88 L.ed. 1095 (1944). State authorities indicate that a serious Federal issue exists here.

**Particular Problems Analyzed:**

This appeal is intended to raise three specific issues, all of which are inherently a part of the foregoing discussion and each of which will now be discussed in greater depth individually. These issues are that the state statute challenged here because it provides that all interest earned on funds placed in Court Registries automatically become public (county) funds (a) violates the Fifth Amendment to the United States Constitution; (b) violates the Fourteenth Amendment to the United States Constitution; and (c) violates Article IV, §4 of the United States Constitution.

**Fifth & Fourteenth Amendments:**

For purposes of this appeal the Fifth and Fourteenth Amendments to the United States Constitution may be discussed simultaneously. This is so because Appellant Webbs is concerned with the Constitutional maxim found in both amendments that "No person shall be deprived of life, liberty or property, without due process of law" as well as the companion maxim that "no private property shall be taken for public use except upon the payment of just compensation."

Appellant Webbs maintains that since "interest goes with the principal as the fruit with the tree" (*Himely v. Rose,* supra) and since the interest on Appellants' money was clearly taken for public use pursuant to a state statute, that statute must be stricken as violative of the Federal Constitution. Appellant observes that even Florida recognizes in situations other than ones involving Registries of State Courts, the use of property constitutes a taking. *Riverside Military Academy v. Watkins,* 19 So.2d 870 (Sup.Ct. Fla., 1944).

We begin with the principle that the Fifth Amendment's command that private property shall not be taken for public use without just compensation is obligatory on the states. *Gideon v. Wainwright,* 372 U.S. 335, 83 Sup.Ct. 792, 9 L.ed.2d 799 (1963). Thus what is prohibited to the national government is prohibited to the states – and privately owned property may not be taken without just compensation being given therefore. *West v. Chesapeake & Potomac Tel. Co.,* 295 U.S. 662, 55 Sup.Ct. 894, 79 L.ed. 1640 (1935). The states are so bound. *Penn. Central Transportation Co. v. New York City,* 438 U.S. 104, 98 Sup.Ct. 2646, 57 L.ed.2d 631 (1978). The effect of retaining all interest here earned, in addition to a statutory fee, may be to deprive creditors already hurt by Webbs' financial misfortune of access to the Courts. In effect, the state presumes to tax access to the Courts, the price of justice being the going rate of interest plus a pre-set statutory flat fee. Basic justice must be without unreasonable charge. *Boddie v. Connecticut,* 401 U.S. 371, 91 Sup.Ct. 780, 28 L.ed.2d 113 (1971). If this Court can strike a statute which imposes too heavy a penalty upon an unsuccessful litigant as a clog upon the privilege of access to the Courts, surely it must strike a statute which would so penalize successful litigants. *Life & Casualty Insurance Co. v. McCray,* 291 U.S. 566, 54 Sup.Ct. 482, 78 L.ed. 987 (1934). A charge upon access to the Courts which relates to a party's wealth or payment of fees is analogous to a poll tax and should not be permitted. *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 86 Sup.Ct. 1079, 16 L.ed.2d 169 (1966). If the charge here made indeed be a tax it is subject to the requirements of the due process and equal protection clauses of the Federal Constitution. *Kahn v. Shevin,* 416 U.S. 351, 94 Sup.Ct. 1734, 40 L.ed.2d 189 (1974). Further, the charge must be deemed a tax under Florida

law since it is a charge imposed to support the operations of government rather than one classifiable as a fee and thus intended to merely offset the attendant expense to government for offering some service in exchange therefore. See *Flood v. State ex rel. Homeland Co.,* 117 So.385 (Sup.Ct. Fla., 1928). See also *Glisson v. Hancock,* 181 So.379 (Sup.Ct. Fla., 1938); *Atlantic Coast Line v. Lakeland,* 115 So.669 (Sup.Ct. Fla., 1927); *State ex rel. Buford v. Spenser,* 87 So.634, (Sup.Ct. Fla., 1921). Significantly, the Clerk told the Florida Supreme Court in his brief to that Court "the Circuit Court Clerk in this action, as a budget officer, will ultimately pay the interest accrued from the monies in interpleader into the general fund of Seminole County." Initial Brief of Appellants to Florida Supreme Court at page 12. The general fund of Seminole County pays for roads, sewers, police protection, animal control and all other general (non-judicial) functions of government. Under Florida law the Courts are not to be used as revenue collectors for general governmental purposes. See *Farabee v. Bd. of Trustees,* 254 So.2d 1 (Sup.Ct. Fla., 1971). Appellant argues such a use of the Courts also offends the Federal Constitution.

What is going on here is the sale of justice. It is a violation of rights even more basic than those set forth in the Constitution for it impedes the natural human right to justice:

> "We realize that the clause of the Magna Charta . . . which we have paraphrased . . . into 'All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay,' has generally been construed . . . against the selling of justice . . . in

> other words, that a free and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to every one. *Malin v. LaMoure County,* 145 N.W. 582 at 586 (Sup.Ct. N.D., 1916).

Finally, Appellant notes (but declines to argue extensively in the interests of time) that the challenged statute is so confusing, because it attempts to cover a multiplicity of subjects and situations, as to be rendered unconstitutionally vague. *Smith v. Goguen,* 415 U.S. 566, 94 Sup.Ct. 1242, 39 L.ed.2d 605 (1974).

**Article IV:**

Appellant Webbs realizes that its weakest argument in a precedential since lies under Article IV of the United States Constitution. This Article is the provision of basic law which provides both that the citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states and that the United States shall guarantee to every state in the Union a "Republican Form of Government."

Traditionally this Court has opined that the guaranty of a Republican Form of Government is a political question for Congress and not a judicial question for the Courts. See *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.,* 281 U.S. 74, 50 Sup.Ct. 228, 74 L.ed. 710, (1930); *Cochran v. Louisiana State Board of Education,* 281 U.S. 370, 50 Sup.Ct. 335, 74 L.ed. 913 (1930).

Nonetheless, Appellant Webbs implores this Court to reconsider. All of the Constitution is for all of the people. All of the Constitution is for this Court to explain and interpret to all of the people. Surely, if a Hitler-like or a

Stalinesque figure were ever to obtain absolute power in any one of our States, this Court would find such a situation offensive to Article IV of our Constitution. Webbs urges this Court not to await such a catastrophe before giving Article IV meaning. Webbs prays that this Court will now see fit to breathe judicial life into such clause.

In lifting this prayer up to the Court, Webbs acknowledges this Court's decisions that: (a) the Federal Constitution does not impose on the states any particular form or plans for the distribution of governmental power [*Mayor of City of Philadelphia v. Educational Equality League,* 415 U.S. 605, 94 Sup.Ct. 1323, 39 L.ed. 2d 630 (1974)]; and, (b) how power is distributed by a state among its governmental organs is commonly, if not always, a question for the state itself and if enforceable at all by the national government is for Congress alone [*Highland Farms Dairy, Inc. v. Agnew,* 300 U.S. 608, 57 Sup.Ct. 549, 81 L.ed. 835 (1937)]; as well as (c) whether the legislative and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state . . . its determination one way or the other not being an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. [*Sweezy v. New Hampshire,* 354 U.S. 234, 77 Sup.Ct. 1203, 1 L.ed.2d 1311 (1957)].

But this Court cannot give meaning to our Constitution if it is as a proverbial ostrich with its head in the sand as to any of the Constitution's parts. Furthermore, this Court has not always declined to consider the meaning and effect

of this portion of the Constitution and it should not do so now for "It is true that the United States guarantees to every state a republican form of government." *Minor v. Happersett,* 21 Wall. 162, at 175, 22 L.ed. 627 (1875).

Additionally, since a rule of reason is ultimately the basic law of our land, it is for this Supreme Court to determine whether an asserted right guaranteed to all citizens of these United States is denied by the laws of any state. *Angel v. Bullington,* 330 U.S. 183, 67 Sup.Ct. 657, 91 L.ed. 832 (1946); *Pollock v. Williams,* 322 U.S. 4, 64 Sup.Ct. 792, 88 L.ed. 1095 (1944). To refuse to so apply a single part of the Federal Constitution strains reason and good sense.

That portion of Article IV which places rights in the citizens cannot be disregarded here when the Constitutional provisions for the security of property, which should be liberally construed [*Boyd v. U.S.,* 116 U.S. 616, 6 Sup.Ct. 524, 29 L.ed. 746 (1886)], are at great risk. *Angel v. Bullington,* supra. The assertion of a Federal right, as Mr. Justice Holmes said, is not to be defeated under the name of local practice. *Davis v. Wechsler,* 263 U.S. 22, 44 Sup.Ct. 13, 68 L.ed. 143 (1923).

Here Appellant maintains that the appropriation for government use of all interest earned by the interpleader fund is a tax. It is clearly for this Court then to determine if the tax as here applied to appellants in fact affects Constitutional rights. *Storaasli v. State of Minn.,* 283 U.S. 57, 51 Sup.Ct. 354, 75 L.ed. 839 (1931). Further, no matter how the state Court may characterize the charges imposed on use of the Court Registry, the United States Supreme Court is not bound by the guises into which State Courts may cast a tax. *St. Louis Cotton Compress Co. v. Arkansas,* 260 U.S. 346, 43 Sup.Ct. 125, 67 L.ed. 297 (1922). See

also *Allegeyer v. Louisiana,* 165 U.S. 578, 17 Sup.Ct. 427, 41 L.ed. 832 (1897). To permit the Courts to function as tax collectors would reduce them to a subordinate branch of government. *Ex parte Coffelt,* 228 P.2d 199 (Crim.Ct. App. Okla., 1951). This Supreme Court should not permit such a state of affairs to exist in light of the provisions of Article IV of the Federal Constitution.

The *Coffelt* decision, supra, bears analysis. In *Coffelt* the State Appellate Court commented on a purported one dollar per case assessment of "costs" for a "Pardon and Parole Fund:"

> "(T)he legislature seeks to collect under the guise of costs a tax for the maintenance of the Pardon and Parole officer and his assistants. Such an attempt clearly violates the fundamentals of the division of powers. It is an attempt to make the courts discharge the function of the executive branch of the government and use them as a tax gathering agency. . . It is a veiled effort to pervert the high functions of the courts, infringe upon their sacred responsibility in the administration of justice only, and make them a collecting agency for the executive branch of government. . . The very idea of such is repugnant to the American concept that the 'Courts of justice . . . be open to every person' . . . The fees we may collect are only those necessarily incident to the role of a tax gatherer for the executive branch of government. To permit such would reduce the courts to a subordinate branch of the government, and pervert its position of coequality with the legislative and executive departments." *Coffelt,* supra, at 202 and 203.

As to such charges, the Florida Courts are in substantial accord. *Farabee v. Bd. of Trustees,* 254 So.2d 1 (Sup. Ct. Fla., 1971), supra.

Perhaps surprisingly, however, the leading case dealing with the issue of the meaning of Article IV of the Federal Constitution comes to us not from the Federal Judiciary but from the Supreme Court of Kansas. Its decision in *VanSickle v. Shanahan,* 511 P.2d 223, (Sup.Ct. Kan., 1973) is the most thoughtful and erudite available on the point of law now before this Court. *VanSickle* was an action challenging the validity of a State Constitutional amendment. In *VanSickle* the Kansas Court made the following points while upholding the validity of amendments to the State Constitution:

(a) The contention that all cases arising under the guaranty clause, Article IV, Section 4, of the United States Constitution, are nonjusticiable, has no historical precedent. As in other cases wherein the "political" controversy bar to judicial enforcement has been raised, courts must look to the facts and circumstances surrounding the litigation, as well as the theory upon which the Constitutional challenge is premised, to ascertain whether the issue may be resolved by the judicial process.

(b) In determining whether a question falls within the category of a "political" controversy, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination, are dominant considerations.

(c) Prominent on the surface of any case held to involve a political question is found a textually demonstrable Constitutional commitment of the issue to a coordinate

political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an intial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

(d) *An outstanding feature of the American constitutional system is the separation of the legislative, executive, and judicial powers of the government.* The governments both state and federal, are divided into three departments, each of which is given the powers and functions appropriate to it. Thus a dangerous concentration of power is avoided, and also the respective powers are assigned to the department best fitted to exercise them.

(e) Generally speaking, the legislative power is the power to make, amend, or repeal laws, the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws in actual controversies.

(f) *The doctrine of separation of powers is an inherent and integral element of the Republican Form of Government, and separation of powers, as an element of the Republican Form of Government, is expressly guaranteed to the states by Article IV, Section 4, of the Constitution of the United States.*

(g) The purpose of the provisions of Article IV, Section 4, of the Constitution of the United States, guaranteeing to each state a Republican Form of Government, is to protect the people of the several states against aristocratic and

monarchial innovations and against insurrection and domestic violence, and to prevent them from abolishing a Republican Form of Government. But such provisions do not forbid the states from amending or changing their laws in any way they may see fit, provided they do not exchange Republican for anti-republican principles.

Thus under the *VanSickle* decision, a Court may exercise authority to enforce and uphold Article IV, Section 4, of the United States Constitution. It is an authority this Court should accept and discharge after giving due consideration to expanding upon even *VanSickle* in the sense that the Kansas decision shows a willingness to tolerate a redistribution of powers among the three branches of government — provided the result of the redistribution is not "anti-republican." The danger of such a restrictive judicial viewpoint is clear. It is acknowledged all three branches of government are necessarily equal partners in the maintenance of a "Republican Form of Government." But, once an anti-republican government is established as the result of successive anti-republican incursions into our system, each one of which incursions in itself may not be sufficient to effect an overall change in the basic nature of our government, it will be too late for this or any other Court to speak. Once anti-republicanism is established, the Courts will stand mute and powerless. Will the Courts only then realize that anti-republicanism is equivalent to anti-democratism and that the opposite of a Republican Form of Government is a totalitarian one? Once such a totalitarian situation is permitted to arise, the judiciary will be powerfuless to correct it.

There is another less dramatic reason this Court should act in the case before it to revive Article IV of the United States Constitution. Here, unlike *VanSickle,* the action questioned does not rise to the dignity of an action

through the people by means of an amendment to their State's Constitution. Here we are looking at a state legislative incursion into Federal Rights, not an incursion (as was the case in Kansas) made by the people themselves and therefore perhaps a bit more tolerable.

In the instant proceeding the legislative authority has presumed, in effect, to tax utilization of the Court Registry and to constitute the Court, through its Clerk, as a tax collector. The legislature here attempts to regulate the terms and conditions upon which the Court Registry may be used. This is anti-republican. This places our concept of equality in the separate branches of government at risk. It is therefore appropriate that this Court now speak and declare that such invasions by one branch of (state) government into the exclusive realm of another will not be tolerated. If this Court remains silent it may someday itself seek to speak on this point only to find that the price of its silence was the emasculation of the various state judiciaries and the abolition of a system of free, fair and unfettered justice in each of the states throughout this Republic, as well as in the national government itself.

## CONCLUSION

For the reasons stated this Court should accept jurisdiction herein and the decision of the Supreme Court of Florida should be reversed with a declaration that §28.33, Official Florida Statutes, 1977, is unconstitutional.

Respectfully submitted,

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*Counsel for Appellants and as Receiver*
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in proper person.

## CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellants in the cause above-captioned, and a member of the Bar of the United States Supreme Court, hereby certify and affirm that all parties required to be served with the foregoing brief, including Harry A. Stewart of 201 S.E. 6th Street, Ft. Lauderdale, Florida 33301, have been served with the foregoing in accordance with Supreme Court Rules.

/s/ Harvey M. Alper
HARVEY M. ALPER, ESQUIRE

# APPENDIX A

Arthur H. BECKWITH, Jr., Clerk of the Circuit Court, etc., Appellants,

v.

WEBB'S FABULOUS PHARMACIES, INC., et al., Appellees.

No. 55213.

Supreme Court of Florida

May 31, 1979

Rehearing Denied Oct. 4, 1979.

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Harry A. Stewart, Sanford, for appellants.

Harvey M. Alper and William H. Wack, of Law Offices of Alper & Wack, Altamonte Springs, for appellees and Harvey M. Alper as receiver, in pro per.

PER CURIAM.

The constitutionality of section 28.33, Florida Statutes (1977), which provides that interest accruing on funds in the registry of the court shall be deemed income of the Office of the Clerk of the Circuit Court, is before the court.[1]

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[1] § 28.33 Fla.Stat. (1977), reads in pertinent part:

> Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned or all investments during the preceding year.

We hold the statute constitutional. Art. V, § 3(b)(1), Fla.Const.

Eckerd's of College Park, Inc. (Eckerd's) entered into an agreement with Webb's Fabulous Pharmacies, Inc. (Webb's) to purchase Webb's assets. Eckerd's, pursuant to statutory authority, filed an interpleader action against Webb's and its creditors, tendering the purchase price of $1,812,145.77. The court appointed a receiver to determine the number and amount of claims filed against these funds and to establish accounts for the deposit of the funds.

On Eckerd's motion, the trial court ordered that the purchase price be deposited in the registry of the court. The court also ordered the clerk to deposit the funds in "an assignable interest bearing account at the highest rate of interest." The court reserved ruling on whether the interest earned on the money would accrue to the court's clerk's office. The clerk followed the court's order. The receiver filed a motion seeking to obtain the interest earned on the money in the sum of $91,474.71. In an order granting the receiver's motion, the trial court held section 28.33, Florida Statutes (1977), unconstitutional to the extent it applied to these "private" monies. The clerk appealed to the Fourth District Court of Appeal and that court transferred the case to this court.

It is the receiver's position (apparently adopted by the trial court), that it is constitutionally inconsistent to have funds held by a receiver and invested by him to result in earnings to the prevailing party, yet funds held by the clerk of the circuit court earning interest to be kept for the general treasury. The statute is also unconstitutional, says the receiver, because it violates section 57.051, Florida

Statutes (1977),[2] and constitutes either a taking without due process of law or an unlawful tax.

[1,2] We begin our analysis by reviewing rules of law so well established as not to require citation. It is not this court's responsibility to determine the wisdom of legislative acts, nor is it the court's function to strike down legislative schemes because we would have fashioned different plans for achieving the desired results. We must begin with the presumption that the act is constitutional, and it is to be upheld unless a specific provision of the state or federal constitution is clearly violated.

Inherent in the trial judge's ruling is a finding that interest earned is the private property of the person ultimately receiving the principal. This proposition rests on the underlying premise that the principal remains private when deposited in the clerk's registry. Neither the premise nor the conclusion withstands close analysis.

[3] Section 28.33 does two things: (1) it authorizes the clerk to invest money in the registry of the court in order to earn interest; and (2) it dictates the disposition of the interest earned. Without this statute, the clerk would have no authority to invest money held in the registry of the court. It is the statute itself which gives the authority to the clerk and outlines the method of disposition.

The notion that title to the interest flows from title to the principal is erroneous. As all other funds in that account, these funds are considered "public money" from the time they are deposited in the general registry of the

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[2] § 57.051, Fla.Stat. (1977), reads in pertinent part:

> (1) PROHIBITION. — No officer shall make two charges for the same official act or service, nor charge for any constructive service. No fee shall be charged for any official service performed or claimed to be performed by any officer unless the fee is specifically authorized and its amount is specified by law.

court to the time they leave the account. *See Money v. State ex rel. Florida First National Bank*, 206 So.2d 436 (Fla. 1st DCA 1968); § 219.01(2), Fla.Stat. (1977).

[4] The receiver states that the interest retained by the clerk of court is either a fee or a tax. It is neither. The statute permits the state to retain only the amount representing interest earned on funds invested by the clerk, a function of the clerk expressly created by the statute. Interest accrues only because of section 28.33. In this sense, the statute takes only what it creates. Failure to recognize this fact would result in the erroneous holding that the clerk is required to pay interest on all funds on deposit with the registry of the court.

[5] It is irrelevant that had these funds been initially held by a receiver, the interest earned would have accrued to the party receiving the principal. In that event, judicial discretion would have been exercised and the legislature, under our separation of powers doctrine, could not effect a change in the court's order. Art. II, § 3, Fla.Const. The legislature has the right, however, to decide that funds held by a public officer in a public account accrue to the benefit of all of the people.

[6] There is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property.

[7] The rule announced today shall apply in this case and in all cases where deposits of funds are made after the effective date of this opinion.

Accordingly, the order of the trial judge is reversed, the statute is held to be constitutional, and the case is remanded to the trial court for further action consistent with this opinion.

It is so ordered.

ENGLAND, C.J., and ADKINS, BOYD, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.

OVERTON, J., concurs in part and dissents in part with an opinion.

OVERTON, Justice, concurring in part, dissenting in part.

I agree that the subject statute is constitutional but only if it is construed as directory rather than mandatory. In my opinion, the trial judge must have the discretionary authority to direct the disposition of the interest earned on funds placed in the registry of the court pursuant to a court proceeding. To hold otherwise allows the legislative branch to improperly interfere with the resolution of a judicial matter.

In my opinion, in order for the statute to be constitutional, the trial court must continue to retain its inherent discretionary authority to direct disposition of the interest earned on funds placed in the registry as part of a court action. Without such authority, the assertion that the retention of the interest by the county is an unconstitutional interference with the judicial process has merit. The clerk receives a fee separate from the interest for acting as a depository, so the interest cannot be considered as a service charge. Section 28.33, Florida Statutes (1977), concerns the investment of all county funds held by the clerk, not just funds in the court registry. Moneys deposited in the "registry of the court" are funds which are strictly and directly controlled by the court. This control is exclusively a judicial function. Allowing the clerk the discretion to earn interest on those funds without any judicial control results in a surcharge on the use of the justice system, and can neither be justified nor allowed if the courts are to be

"open to every person for redress of any injury." Art. I, § 21, Fla.Const. In the instant case, the mandatory price tag for the use of the justice system, under the majority opinion, is $91,474.71. The impropriety of such a charge is even more egregious when we consider the fact that there are statutes which require the interpleading of funds into the registry of the court. *See, e.g.*, § 676.106, Fla.Stat. (1977) [Uniform Commercial Code].

I would uphold the constitutionality of the statute and construe the part relating to court registry funds as directory, allowing the trial judge to affirmatively direct the disposition of interest earned. If there were no such affirmative judicial action, the interest earned would be disposed of in acccordance with the statutory provision.

## APPENDIX B

**28.33 Investment of county funds.**—The Clerk of the Circuit Court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. All investments shall be open for bid to all qualified depositories in the county. The clerk shall select the highest and best bid for deposit. All bids received by the clerk shall include, but not be limited to, the interest rate to be earned and the total amount of dollar return to be paid to the clerk. In the event of a like bid between two or more banks, the moneys shall be divided and deposited in each bank, so long as the total interest income from the divided deposits will not be less than the total interest income had the deposits not been divided. If at the time of bid the dollar return on direct obligations of the Federal Government is greater than the highest bank return, then the clerk shall invest in the higher return security. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations. In any county where local banks refuse to bid on securing such money on interest-bearing certificates, the clerk may request and receive bids from banks in other counties within the state and make such deposits to the successful bidder. All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the

same accounts as are other fees and commissions of the clerk's office. Each clerk shall, as soon as is practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year.

FILED
JUN 3 1980
MICHAEL RODAK, JR., CLERK

in the

# Supreme Court

of the

# United States

**OCTOBER TERM, 1979**

**NO. 79-1033**

WEBB'S FABULOUS PHARMACIES, INC.,
AND ECKERD'S OF COLLEGE PARK, INC., et al
*Appellants,*

*vs.*

ARTHUR H. BECKWITH, JR.,
CLERK OF THE CIRCUIT COURT,
AND SEMINOLE COUNTY, FLORIDA,
*Appellees.*

**On Appeal from the**
**Supreme Court of the State of Florida**

## BRIEF FOR THE APPELLEES

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CLERK OF THE CIRCUIT COURT,
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**On Appeal from the**
**Supreme Court of the State of Florida**

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**BRIEF FOR THE APPELLEES**

## JURISDICTION

This Court noted probable jurisdiction in this case on March 17, 1980, under 28 U.S.C. §1257(2).

## QUESTION PRESENTED

Whether Section 28.33, Florida Statutes, violates the Fifth and Fourteenth Amendments and Article IV, §4, of the United States Constitution to the extent it provides that interest earned on funds during the period of their deposit in a Florida Circuit Court registry shall be deemed income of the office of the Circuit Court Clerk.

## STATUTE INVOLVED

The Statute involved, Section 28.33, Florida Statutes, is set out in full in Appendix B of the Brief for the Appellants.

## STATEMENT OF THE CASE

In this Brief, ARTHUR H. BECKWITH, JR., Circuit Court Clerk for Seminole County, Florida, will be referred to as "Circuit Court Clerk" and HARVEY M. ALPER, as Receiver, will be referred to as the "Receiver." References to the Appendix shall be in the same manner as in the Brief for the Appellants.

Seminole County, Florida, and the Circuit Court Clerk perfected an appeal to the Florida Supreme Court from the final orders of the Circuit Court, Eighteenth

Judicial Circuit, in and for Seminole County, Florida, entered on July 24, 1978 (34a-35a) and August 23, 1978 (40a-41a). The orders collectively held that the Circuit Court Clerk is not entitled to interest earned on monies in interpleader deposited in the registry of the Circuit Court in this action, such interest to be paid to the Receiver, and that Section 28.33, Florida Statutes (hereinafter referred to as Section 28.33), and Chapter 73-282, Laws of Florida, are unconstitutional "to the extent that the provisions thereof pertain to private monies held in the registry of the court. . . ." The Florida Supreme Court reversed, holding that interest earned pursuant to Section 28.33 should be disposed of pursuant to that statute's direction. *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (1979).

As background, Eckerd's of College Park, Inc. (Eckerd's), entered into an agreement to purchase the assets of Webb's Fabulous Pharmacies, Inc. (Webb's). Pursuant to Section 676.106(4), Florida Statutes, Eckerd's then filed a Complaint of Interpleader in the Circuit Court below, interpleading Webb's and Webb's creditors as defendants and tendering the purchase price of $1,812,145.77 into the Circuit Court registry. Subsequently, on its own motion, the Circuit Court appointed the Receiver to determine the number and amount of claims filed against the monies in interpleader and to investigate the establishment of an account or accounts in which to deposit the monies (7a-9a).

The Circuit Court, on Eckerd's motion, then ordered that the tendered purchase price be paid to the Circuit Court Clerk to be deposited in "an assignable

interest bearing-account at the highest rate of interest" and reserved ruling on whether the interest earned on the monies in interpleader would accrue to the benefit of the Circuit Court Clerk's office (4a-5a). The monies were accordingly delivered to the Circuit Court Clerk (6a), who in turn deposited the monies in interest-bearing accounts.

Upon the Receiver's motion (10a-13a), the Circuit Court ordered that the monies in interpleader be delivered by the Circuit Court Clerk from the registry to the Receiver and directed the Circuit Court Clerk to continue to hold the accrued interest from the monies in the registry until a determination of the rightful party to receive the interest could be made (14a-15a). The Circuit Court Clerk subsequently paid the monies in interpleader to the Receiver, minus fees and amounts previously paid out.

The Receiver then filed a motion to direct the Circuit Court Clerk to pay to the Receiver the amount of interest accrued from the monies in interpleader while deposited in the Circuit Court registry (22a-34a). Following submissions of memoranda and a hearing on the matter, the Circuit Court entered the orders that the Appellees here appealed to the Florida Supreme Court (34a-35a, 40a-41a).

It is from the decision of the Florida Supreme Court reversing the Circuit Court that the Appellants have perfected this appeal.

## SUMMARY OF ARGUMENT

A definition of "property" protected by the Fifth and Fourteenth Amendments of the United States Constitution has evolved in the decisions of this Court and lower federal court decisions which make clear that the Constitution itself does not create property. Rather, the property interests which the Fifth and Fourteenth Amendments protect are those interests that a person has already acquired pursuant to existing rules or understandings that stem from an independent source such as state law. Unilateral expectations do not constitute property. See *Fox River Paper Co. v. Railroad Commission,* 274 U.S. 651 (1927); and *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Applying this definition here, the interpleader claimants below can point to no existing rule or understanding that legitimately entitles them to the disputed interest. In fact, the general rule is that, in the absence of a statute to the contrary, interest is not allowable for the period during which disputed funds are deposited in court pending the outcome of litigation as to their ownership. 45 *Am.Jur.2d* Interpleader §40 (1969). Thus, if the claimants have any right to the interest earned on the interpleader funds, they must look to state statutes. However, Section 28.33, the only general state statute that provides for the investment of funds deposited in a circuit court registry, also provides that the interest earned shall be deemed income of the Circuit Court Clerk's office. The attempt by the Receiver to take advantage of the benefit of Section 28.33 (i.e., the interest), while challenging this disposition requirement not only violates the express

terms of Section 28.33, but contradicts this Court's doctrine that one may not seek the benefits of a statute while attacking the constitutionality of its conditions. See *Fahey v. Mallonee,* 332 U.S. 245 (1947); and *Arnett v. Kennedy,* 416 U.S. 134 (1974). The Florida Supreme Court was correct, therefore, in holding that the interpleader claimants below have no property right to the disputed interest.

The fact that the interpleader claimants have no property right to the disputed interest also answers the Receiver's claim that Section 28.33 violates the guaranty clause of Article IV, Section 4, of the Federal Constitution. The disposition of the interest mandated by Section 28.33 cannot be an invalid "tax" on the utilization of the Circuit Court registry if the interest is not the property of the claimants. In addition, Section 28.33 obviously does not so destroy the state judiciary or materially curtail its powers as to create an "anti-republican" form of government in Florida. Thus, Section 28.33 has effected no violation of Article IV, Section 4. See *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223 (1973); and *State v. Lehtola,* 55 Wis.2d 494, 198 N.W.2d 354 (1972).

## ARGUMENT

### I. INTRODUCTION

The Florida Supreme Court essentially determined in its decision below that under Florida law, interest earned on funds deposited by private litigants in the registry of the Circuit Court (trial court) is not the "private property" of the person or persons ultimately

receiving the principal. This determination was based in part on the Court's express recognition that, in the absence of Section 28.33, there would exist no requirement in Florida law that interest be earned on registry deposits. 374 So.2d at 953.

Also, in response to the Receiver's argument that the disposition of interest earned on registry deposits mandated by Section 28.33 violated the "Separation of Powers" doctrine of the Florida Constitution (a disposition which the Receiver now claims is also "anti-republican"), the Florida Supreme Court concluded that the Florida Legislature has the right to decide that interest earned on "funds held by a public officer in a public account accrue to the benefit of all the people." 374 So.2d at 953.

The Appellees maintain that these determinations and conclusions of the Florida Supreme Court are imminently correct and should be sustained.

## II. FIFTH AND FOURTEENTH AMENDMENTS

The Receiver first asserts that Section 28.33, to the extent it applies to interest earned on registry deposits made by private litigants, and particularly on the interpleader monies deposited in the Circuit Court below, effects a deprivation or taking of private property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. However, this assertion merely begs the more fundamental issue involved in this appeal: Is the interest here in dispute indeed constitutionally protected "private property?"

## A. Definition Of "Property"

In *Fox River Paper Co. v. Railroad Commission*, 274 U.S. 651 (1927), the Wisconsin Supreme Court had determined that under state law, certain riparian landowners had no property right in the water power created by damming a navigable river as long as the state withheld its consent to the construction or maintenance of the dam. On appeal, the landowners claimed that the state's denial of consent deprived them of their property without due process of law in violation of the Fourteenth Amendment. In response this Court first observed that, considering established rules of property of the state and earlier state judicial decisions, there was no basis upon which to find that the Wisconsin Supreme Court adopted its view in order to evade the constitutional issue. The opinion then concluded as follows:

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine . . . It is for the state court in cases such as this to define rights in land located within the state, and *the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent.*
>
> *We accept as conclusive the state court's view of the nature of the rights of riparian owners.* We therefore find in the refusal of the

commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth Amendment." 274 U.S. at 657. (emphasis supplied)

See also *United States v. Willow River Power Co.*, 324 U.S. 499 (1945), likewise holding that there was no taking of property in violation of the Fifth Amendment where consistent with applicable state law, the plaintiff, a riparian power company, had no property right in the highwater level of a navigable river.

More recently, in *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court held that a non-tenured assistant professor had not been deprived of an interest in property in violation of the Fourteenth Amendment when he was terminated without an opportunity to be heard. According to the decision:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person *has already acquired* in specific benefits. Those interests — property interests — may take many forms.
>
> . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have *a legitimate claim of entitlement to it*. . . .
>
> *Property interests, of course, are not created by the Constitution.* Rather, they are created and

> their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." 408 U.S. at 576-577.

See also *Perry v. Sindermann,* 408 U.S. 593 (1972); *Arnett v. Kennedy* 416 U.S. 134 (1974), in which the plurality held that a statutory grant of a substantive property interest in employment may be limited by statutorily prescribed procedural safeguards; and *Leis v. Flynt,* 439 U.S. 438 (1979), holding that out-of-state lawyers have no constitutionally protected property right stemming "from an independent source such as state law," to appear in the court of a state where they are not licensed to practice.

The *Roth* definition of "property" for purposes of the Fifth and Fourteenth Amendments has been applied by lower federal courts in various contexts. For example, in *United States v. Richards,* 583 F.2d 491 (10th Cir. 1978), the defendant was convicted of selling sparrow hawks in violation of federal regulations prohibiting the sale of such birds, "whether or not raised in captivity." The defendant had acquired and raised the hawks prior to adoption of the federal regulations under state permits authorizing the collection of the birds for certain scientific purposes and allowing the sale of "young produced from captive birds." The Court held that these state permits granted at most a partial property interest which did not encompass all usual property rights. Thus, citing *Roth* for the proposition that the Fourteenth Amendment safeguards only

property "already acquired," the Court rejected the defendant's claims of unconstitutional deprivation of property. 583 F.2d at 496.

Similarly, in *United Land Corporation of America v. Clarke,* 613 F.2d 497 (4th Cir. 1980), a land developer was denied a soil erosion permit by county officials due to an emergency county moratorium on the issuance of such permits adopted after the developer had applied. The moratorium was imposed prior to the expiration of the forty-five day period during which the county officials were required by pre-moratorium regulations to approve or disapprove the application. In response to the developer's argument that denial of the permit violated the Fourteenth Amendment, the Court found that the developer had no protectible property interest in the permit at the time the moratorium was imposed because the prescribed forty-five day period had not run on its application. According to the Court, the allegations of the developer's complaint fell short of establishing that either state law or county ordinance entitled the developer to an erosion control permit. 613 F.2d at 501. Thus, the developer possessed no property right to which the Fourteenth Amendment could apply.

Also, in *Rodic v. Thistledown Racing Club, Inc.,* 615 F.2d 736 (6th Cir. 1980), the plaintiff had been permanently barred by racing officials from entering a horsetrack where he had been engaging in objectionable activities. The plaintiff claimed that his expulsion from the track deprived him of a property interest in violation of the Fourteenth Amendment. In its decision the Court first recited language in *Roth* to the effect that "the Constitution does not create property interest" and that

protected interests must "stem from an independent source such as state law." It then observed that the plaintiff had revealed no state law or other "independent source" granting him a right of admission to the horsetrack. Accordingly, the Court denied the plaintiff's constitutional claim. 615 F.2d at 739-740.

Finally, in *Moore v. Johnson,* 582 F.2d 1228 (9th Cir. 1978), domicilliary care patients in a Veterans Administration facility claimed they had a property interest protected by the Fifth Amendment not to be relocated to another care facility. Again, however, the court cited *Roth* for the proposition that, in order to qualify as a constitutionally protected property interest, the plaintiffs had to have more than a "unilateral expectation." They had to have "a legitimate, objectively justifiable claim to the benefits of the governmental program," the source of which claim "is not the Constitution but rather the acts of the sovereign, state or federal, manifested in legislation, rules, or customs." 582 F.2d at 1233. Finding that the plaintiffs' claims of entitlement were not based on any such sovereign act, the Court ruled that no violation of the Fifth Amendment had occurred. See also *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438 (2nd Cir. 1980); and *Ledford v. Delancey,* 612 F.2d 883 (4th Cir. 1980).

### B. Application Of Definition To The Disputed Interest

The definition of "property" for purposes of the Fifth and Fourteenth Amendments that has thus evolved makes clear that those amendments do not

themselves create property interests. Rather, protected property interests are those interests that a person has already acquired pursuant to existing rules or understandings that stem from an independent source such as state law. Protected property interests do not include unilateral expectations or abstract needs or desires.

The Florida Supreme Court's decision below that the disputed interest is not the private property of the interpleader claimants is consistent with this definition. First, the Florida Supreme Court's decision comports with the general rule that the award of interest is in derogation of the common law and should be refused except in such cases as come within enabling legislation. See 45 *Am.Jur.2d* Interest §34 (1969); and *Phillips Petroleum Co. v. Adams,* 513 F.2d 335 (5th Cir. 1975), *cert. denied,* 423 U.S. 930. Thus, it is ordinarily held that, in the absence of a statute to the contrary, interest is not allowable for the period during which disputed funds are deposited in court pending the outcome of litigation as to their ownership. Interest is not recoverable against the party depositing the funds in court, nor against the unsuccessful litigant or the mere depository of the funds. See 45 *Am.Jur.2d* Interpleader §40 (1969); Annot., 15 *A.L.R.2d* 473 (1951); and 18A *Fla.Jur.* Interpleader §21 (1971). This rule appears to be a logical extension of the concomitant proposition that none of the adverse claimants has any legal or beneficial right to disputed funds deposited in court until the funds are paid out. See 23 *Am.Jur.2d* Deposits in Court §6 (1969). If no such legal or beneficial right exists, then there can be no legitimate entitlement by any of the adverse claimants to interest on those funds in the

absence of statutory authority to the contrary. Cf. *Sherrell v. Shepard's Administrator,* 19 Fla. 300 (1882); *Morton v. Ansin,* 129 So.2d 177 (Fla. 3rd DCA 1961); and *Behm v. Division of Administration,* 366 So.2d 828 (Fla. DCA 1979).

In addition, the Florida Supreme Court's decision conforms to Florida statutory law. There is no general state statute other than Section 28.33 that relates to interest earned on funds deposited in a Florida Circuit Court registry. Moreover, while Section 28.33 requires that interest be earned on such funds, it also expressly requires that the disposition of that interest be to the office of the appropriate Circuit Court Clerk. The Florida Supreme Court's decision gives effect to both of these requirements. The Receiver, however, would have this Court give effect to the former (i.e., the interest requirement), but not the latter (i.e., the disposition requirement).

Such an application of Section 28.33 would not only violate the express terms of that statute, but would contradict this Court's doctrine that one may not seek the benefits of a statute while attacking the constitutionality of its conditions. As stated in *Fahey v. Mallonee,* 332 U.S. 245, 255 (1947),

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' *United States v. San Francisco,* 310 U.S. 16, 29. As formulated by Mr. Justice Brandeis, concurring in *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288,

> 348, 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' "

Again, in *Arnett v. Kennedy,* supra at 152-154, it was observed that, in order to approve the discharged federal employee's Fifth Amendment claim to a full adversary hearing, this Court would have been compelled to ignore the "unmistakable clarity" of the federal act involved by holding that the act granted federal employees

> ". . . not merely that which Congress had given them in the first part of a sentence [i.e., no dismissal without 'cause'], but that which Congress had expressly withheld them in the latter part of the same sentence [i.e., a full adversary hearing]. Neither the language of the Due Process Clause of the Fifth Amendment nor our cases construing it require any such hobbling restriction on legislative authority in this area."

It is thus apparent that the Florida Supreme Court overlooked no established rule of law or state statute that establishes the present legitimate entitlement of the interpleader claimants below to the disputed interest. See *Fox River Paper Co. v. Railroad Commission,* supra.; and *Roth,* supra. The Court rightfully did not consider the Constitution or the claimants' unilateral expectations as a source of their claimed property right. See *Roth,* supra. It also correctly declined to approve the claimants' attempt to take advantage of the benefits of Section 28.33 — the only "sovereign act" that could serve as the "independent

source" of their alleged property right — while attacking the constitutional validity of that statute's limitations. See *Fahey v. Mallonee,* supra. Thus, the Florida Supreme Court's determination that the claimants' alleged property right is nonexistent should be accepted as conclusive by this Court for purposes of the Fifth and Fourteenth Amendments.

### C. Other Jurisdictions

As previously stated in the Appellee's Motion to Dismiss or Affirm, the cases cited by the Receiver from other jurisdictions are, for the most part, consistent with the Florida Supreme Court's decision below in the sense that they too followed the applicable legislative scheme. Thus, for example, in *Metropolitan Water Dist. v. Adams,* 32 Cal.2d 620, 197 P.2d 543 (1948), the California Supreme Court construed that state's Depository Act as requiring the return to the water district of interest earned on funds deposited by it in court during condemnation proceedings. The Act provided that interest earned on funds be paid to the "public or municipal corporation represented by the officer making such deposit." The Court determined that the water district was that "corporation." In its decision, the Court also recited the general rule, stated above, that "[i]n the absence of a statute which, in effect, accretes sums to amounts deposited . . . no claim would arise for return of other than the original deposit." 197 P.2d at 548. See also *Board of Law Library Trustees v. Lowery,* 67 Cal.App.2d 480, 154 P.2d 719 (1945); and *Ponoma City School District v. Payne,* 9 Cal.App.2d 510, 50 P.2d 822 (1935).

On the other hand, where no applicable legislative scheme existed for the disposition of interest earned on funds deposited in court, the courts have generally allowed the interest to flow with the principal. Thus, for example, in *Bordy v. Smith,* 150 Neb. 272, 34 N.W.2d 331 (1948), interest had been earned on the proceeds from county tax foreclosure bids while the proceeds were being held by the court clerk. There was no statutory direction as to the appropriate disposition of the interest, so the Nebraska Supreme Court relied on the general rule that "where there is no statute to the contrary . . . interest becomes a part of the fund by whose investment it was produced," and awarded the interest to the county. 34 N.W.2d at 334. See also *Kiernan v. Cleland,* 47 Ida. 200, 273 P. 938 (1929); *Drainage Dist. No. 2 v. Ada County,* 38 Ida. 778, 226 P. 290 (1924); and *State v. McFetridge,* 84 Wis. 473, 54 N.W. 1 (1893).

Likewise, in *United States v. MacMillan,* 253 U.S. 195 (1920), this Court was concerned with the proper disposition of interest earned on fees and emoluments received by a federal district court clerk. Consistent with its previous decision in *United States v. Mason,* 218 U.S. 517 (1910), in which such fees and emoluments were found to be amounts allowed a clerk "for his compensation and office expenses under the statutes defining his rights and duties," this Court held that the interest in question was not subject to general federal laws relating to public monies of the United States. Although not an issue in the case because no claim of ownership was being made by the government, the Court noted that private litigants could apply under applicable rules of court for the return of any interest

earned on their funds while deposited with the clerk. 253 U.S. at 205.

Even the cases cited by the Receiver that appear most inconsistent with the Florida Supreme Court's decision below may be explained in this manner. The courts in those cases merely determined that, under the laws of the states involved, the litigants had a protected property right in the interest accrued on the deposited funds. Thus, for example, the Texas Supreme Court in *Sellers v. Harris County,* 483 S.W.2d 242 (Tex. 1972), deemed it very significant that the deposited funds were statutorily denominated "trust funds," thus implying a fiduciary duty on the part of the court clerk to account for the interest to the litigants.

Likewise, in *University of South Carolina v. Elliot,* 248 So.C. 218, 149 S.E.2d 433 (1966), the South Carolina Supreme Court held that, under general principles of fiduciary relationships, the interest earned on condemnation funds deposited with the clerk of court of Richland County should be refunded to the University along with the principal unless the statute involved "has the effect of transferring ownership thereof to Richland County." The Court then determined that the statute did not have that effect since the condemnation funds were not "public funds" within the purview of the statute. See also *Southern Oregon Co. v. Gage,* 100 Or. 424, 197 P. 276 (1921). Also, in *McMillan v. Robeson County,* 262 N.C. 413, 137 S.E.2d 105 (1964), the North Carolina Supreme Court did not make any substantive determinations as to entitlements to the interest earned on amounts held by the court clerk, but emphasized portions of the controlling statute which appeared to

grant certain potential claimants a fiduciary interest in those amounts and to authorize any valid claims with respect to the interest.

As can be seen, therefore, the Florida Supreme Court's decision below is in accordance with the cases from other jurisdictions in that it gave effect to the clear legislative scheme for disposition of the disputed interest earned under Section 28.33. The fact that there is such a legislative scheme in Florida precludes an application of the general rule that, in the absence of a statute to the contrary, interest flows with the principal. Also, the fact that Florida's legislative scheme is different from those applicable in other states does not render it any less valid. See *Fox River Paper Co. v. Railroad Commission,* supra at 657. If anything, the variety of statutory provisions and judicial interpretations of those provisions emphasize that the determination of whether interest earned on funds deposited in court is "property" protected by the Fifth and Fourteenth Amendments, is truly a matter of state law.

## III. REPUBLICAN FORM OF GOVERNMENT

The Florida Supreme Court's determination that the disputed interest is not the private property of the interpleader claimants below should also resolve the Receiver's claim that Section 28.33 violates the Federal Constitution's guarantee of a republican form of government. U.S. Const. Art. IV, §4. Since the interest is not the property of the claimants under state law, there can be no valid claim that the disposition of that interest prescribed by Section 28.33 imposes a "tax" on their utilization of the Circuit Court registry.

Moreover, as admitted by the Receiver in his Brief (p. 40), the proper distribution of power among state governmental organs is ordinarily a matter for the state itself to decide. In Florida, the appropriate separation of power between the legislature and the judiciary is established in the State Constitution, and the state judiciary has very jealously guarded its authority. See Fla. Const. Art. II, §3, Art. III and Art. V; *Johnson v. State,* 336 So.2d 93 (1976); *Simmons v. State,* 160 Fla. 626, 36 So.2d 207 (1948); *State v. Young,* 238 So.2d 589 (1970), *appeal dismissed,* 400 U.S. 962; and *Farabee v. Board of Trustees Lee County Law Library,* 254 So.2d 1 (Fla. 1971). (The latter two cases upheld certain statutory assessments connected with litigation.)

The most exhaustive judicial treatment of the Federal Constitution's guaranty clause occurred in *Vansickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223 (1973). There, the appellants challenged an amendment to the Kansas Constitution allowing the state governor to reorganize the executive branch, subject to legislative veto. In response, the Kansas Supreme Court first reviewed extensively the history of that clause, ending with a quote from James Madison to the effect that it is only where "the whole power of one department is exercised by the same hands which possess the whole power of another department, [that] the fundamental principles of a free constitution are subverted. *(Federalist* Nos. 43, 47)" 511 P.2d at 243. The Court then found that although the challenged amendment did vest in the governor a limited share of legislative power to make law, it had not destroyed the legislative and executive departments or materially curtailed their powers or authority. Thus, the Court found no violation of the guaranty clause.

Likewise in *State v. Lehtola*, 55 Wis.2d 494, 198 N.W.2d 354 (1972), the Wisconsin Supreme Court found no merit in the argument that a district attorney as an officer of the executive branch, was performing a judicial function in issuing an information upon which a person could be tried for a crime. In any event, the Court stated that

> "Some mixing of powers is permissible and the field of administrative law is also an example. See *Highland Farms Dairy v. Agnew* (1937), 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835. Unless a power transferred from one branch is substantial or its retention essential to the 'separation of power' doctrine, there is no violation of Article IV, Section 4, of the constitution which provides the United States shall 'guarantee to every state in this union a Republican Form of Government.' " 198 N.W.2d at 356.

Applying these judicial treatments of the guaranty clause here, Circuit Court Clerks in Florida are county officers whose powers and duties are fixed by law. See Fla. Const. Art. II, §5(c) and Art. VIII, §1(d). Section 28.33 merely assigns a duty to Circuit Court Clerks with respect to registry deposits which come into their custody. No power, much less substantial power, has been taken from the judiciary through this statutory assignment of duties. In fact, the Florida Supreme Court in its decision below made clear that, had the Circuit Court initially ordered the interpleader funds to be held by the Receiver, no statutory direction otherwise could have prevented it from doing so under the Florida

Constitution's "Separation of Powers" doctrine. Accordingly, Section 28.33 has not "destroyed" the judicial branch of Florida government or denied the judiciary any of its essential authority in violation of the guaranty clause.

## CONCLUSION

For the reasons stated this Court should dismiss this appeal or affirm the Florida Supreme Court's decision below.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellees in the cause above captioned, and a member of the Bar of the United States Supreme Court, hereby certify and affirm that all parties required to be served with the foregoing brief, including HARVEY M. ALPER, Massey, Alper, Wack & Eaton, 165 Whooping Loop, Altamonte Springs, Florida 32701, Attorney for Appellants, and to all other persons required to be served in accordance with the Supreme Court Rules.

HARRY A. STEWART